Supreme Court, U.S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1956

No. 175

PAUL M. SWEEZY,
Appellant,
vs.
STATE OF NEW HAMPSHIRE
by LOUIS C. WYMAN,
ATTORNEY GENERAL,
Appellee

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

BRIEF FOR APPELLANT

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No. 175

PAUL M. SWEEZY,
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STATE OF NEW HAMPSHIRE
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BRIEF FOR APPELLANT

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

OPINIONS BELOW

The judgment and order of the Superior Court of New Hampshire are not reported; they appear on page 208 of the record herein. The opinion of the Supreme Court of New Hampshire is reported at 100 N. H. 103, 121 Atl. 2d 783, and is printed in the record at pages 210-222.

The ruling of the Supreme Court of New Hampshire on appellant's second motion for rehearing is not reported but appears at page 209 of the record.[1]

JURISDICTION

Petition was filed by Louis C. Wyman, Attorney General of the State of New Hampshire, on June 11, 1954, in the Superior Court for Merrimack County, New Hampshire, pursuant to Revised Laws of New Hampshire (1942), Chapter 370, Sections 18 and 19 (now N. H. Rev. Stat. Ann., 1955, Ch. 491, Sec. 19 and 20) (R. 3-11). The petition sought to compel appellant to answer certain questions which he had refused to answer during the course of an investigation conducted by the Attorney General of New Hampshire under New Hampshire Laws of 1953, Chapter 307, which delegated to the Attorney General power to investigate certain matters in connection with New Hampshire Laws of 1951, Chapter 193 (now N. H. Rev. Stat. Ann., 1955, Ch. 588, Sec. 1-16). After hearing, the Superior Court on June 30, 1954, ordered appellant to answer before the Court certain of the questions propounded by the Attorney General and, upon his refusal, adjudged him in contempt of court, and ordered him committed to the County Jail until purged of contempt (R. 201-8).

Appellant thereupon excepted to the Superior Court's rulings and appealed to the Supreme Court of New Hampshire, the highest court of the State of New Hampshire (R. 1-3). On March 6, 1956, the Supreme Court of New Hampshire overruled appellant's exceptions and affirmed the judgment and order of the Superior Court (R. 210-22). Motion for rehearing was

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[1] In denying appellant's first motion for rehearing (R. 222-3) the Supreme Court of New Hampshire modified its original opinion in minor respects. The opinion as reported, and as printed in the record here, incorporates these changes.

filed by appellant and denied on March 29, 1956 (R. 222-3, 209). A second motion for rehearing was denied April 19, 1956 (R. 224, 209).

Notice of appeal to the Supreme Court of the United States was filed with the Supreme Court of New Hampshire on April 19, 1956 (R. 227-9). The Jurisdictional Statement was filed with this Court on June 18, 1956, and on October 8, 1956 the Court entered an order postponing further consideration of the question of jurisdiction to the hearing of the case on the merits (R. 230).

The jurisdiction of this Court is invoked under Title 28, United States Code, Sections 1257 (2) and 2101 (e). Discussion of the jurisdictional issues raised by this appeal appears in Point I of this brief (*infra*, pp. 21-6).

QUESTIONS PRESENTED

1. Whether Chapter 307, New Hampshire Laws of 1953, which the Supreme Court of New Hampshire has construed as authorizing the Attorney General of New Hampshire, acting as a legislative committee, to compel appellant to answer certain questions concerning statements made by appellant in lectures before classes at the University of New Hampshire, violates appellant's right to freedom of speech as guaranteed by the First and Fourteenth Amendments of the Constitution of the United States.

2. Whether Chapter 307, New Hampshire Laws of 1953, which the Supreme Court of New Hampshire has construed as authorizing the Attorney General of New Hampshire, acting as a legislative committee, to compel appellant to answer certain questions concerning the activities of appellant and others in connection with the Progressive Citizens of America and the Progressive Party, violates appellant's rights to freedom of speech or assembly or the right to petition for redress of grievances,

as guaranteed by the First and Fourteenth Amendments of the Constitution of the United States.

3. Whether Chapter 307, New Hampshire Laws of 1953, which the Supreme Court of New Hampshire has construed as set forth in questions 1 and 2, deprives appellant of liberty and property without the due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.

4. Whether Chapter 307, New Hampshire Laws of 1953, which the Supreme Court of New Hampshire has construed as set forth in questions 1 and 2, violates Article VI of the Constitution of the United States in that it purports to deal with matters within the exclusive power of the Federal Government, and with respect to which the Federal Government has already legislated to the exclusion of state legislation.

STATUTES INVOLVED

The statutes involved are New Hampshire Laws of 1951, Chapter 193 (now N. H. Rev. Stat. Ann., 1955, Ch. 588, Sec. 1-16), known as "The Subversive Activities Act of 1951;" and New Hampshire Laws of 1953, Chapter 307, a "Joint Resolution Relating to the Investigation of Subversive Activities." Both statutes are printed in Appendix A to this brief (*infra*, pp. 62 and 71).

Also printed in Appendix A are New Hampshire Laws of 1955, Chapter 181 (N. H. Rev. Stat. Ann., 1955, Supp. Ch. 588, Sec. 3a and 3b), amending the Subversive Activities Act of 1951 (App. A, *infra*, p. 72); and New Hampshire Laws of 1955, Chapter 197 and 340, extending the authority of the Attorney General to investigate until June 30, 1957 (App. A, *infra*, pp. 74 and 75).

STATEMENT OF THE CASE

This case involves the power of a state legislature, conducting a legislative inquiry through the Attorney General of the state, to compel appellant to answer questions concerning the contents of his lectures as a guest speaker at the University of New Hampshire. It also raises the question whether such a legislative investigation can probe into appellant's participation in the Progressive Party and Progressive Citizens of America, political organizations not shown to have engaged in any illegal activity. In both situations appellant answered all questions pertaining to the use or advocacy of force or violence, but the Attorney General attempted to go beyond this point and question appellant concerning wholly legitimate expression. The issues, it will be noted, arise in the vital areas of academic freedom and the right of political association.

Appellant, Paul M. Sweezy, is a resident of Wilton, New Hampshire, where he has lived in the summer since he was six years of age, and continuously since the end of World War II (R. 19). Dr. Sweezy is a graduate of Phillips Exeter Academy and Harvard University (R. 20). He studied at the London School of Economics and at the University of Vienna, and obtained a doctor's degree in economics from Harvard in 1937 (R. 20). From 1934 to 1942 Dr. Sweezy was a member of the Harvard faculty, leaving to enter the armed forces (R. 20). During most of the War he was assigned to the Office of Strategic Services (R. 20). He left the Army as a Second Lieutenant (R. 20), receiving a Bronze Star for his service (Exhibit 7, not printed, R. 144). Upon returning to civilian life, Dr. Sweezy was awarded a research scholarship by the Social Science Research Council (R. 21). Since the War, he has devoted himself to research, writing, and the publication of a monthly journal of opinion, *The Monthly Review* (R. 21, 39).

Dr. Sweezy is a distinguished economist and a well-known authority upon socialism (R. 143-4). Among his published works are *The Theory of Capitalist Development (1942)*, *Socialism (1949)*, and, most recently, *The Present as History* (R. 32, 34, 144). In political orientation he is a socialist and a Marxist (R. 39-45, 80-2, 108-10, 144). Beginning in 1952 he had been invited by the staff at the University of New Hampshire in charge of the Humanities Course to give a lecture on socialism each year to the students in that course (R. 70-2, 103-4). He also participated in class discussions at the University of New Hampshire on other occasions (R. 103).

In 1951 New Hampshire passed The Subversive Activities Act of 1951 (N. H. Laws of 1951, Ch. 193, reprinted in Appendix A, *infra*, pp. 62-70). Briefly, this statute set forth definitions of "subversive organization," "foreign subversive organization," and "subversive person;" it declared certain acts, utterances and participation in "subversive organizations" or "foreign subversive organizations" to be felonies, subject to imprisonment up to twenty years; it made the existence of such organizations unlawful and provided for their dissolution; and it made "subversive persons" ineligible for government employment or election to public office and established a loyalty program to eliminate them from government service. The definition of "subversive person" in the Act is as follows:

> "'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches, by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of New Hampshire, or any political subdivision of either of them, by force, or violence; or who is a member of a subversive organization or a foreign subversive organization" (Sec. 1).

Two years later, the New Hampshire legislature passed the Joint Resolution Relating to the Investigation of Subversive Activities (N. H. Laws of 1953, Ch. 307, reprinted in Appendix A, *infra*, pp. 71-2). This resolution authorized and directed the Attorney General "to make full and complete investigation with respect to violations of the subversive activities act of 1951 and to determine whether subversive persons as defined in said act are presently located within this state." The Attorney General was directed to "report to the 1955 session . . . the results of this investigation, together with his recommendations, if any, for necessary legislation." He was further authorized "to require by subpoena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents . . . as he deems advisable." The Attorney General was given no power to punish witnesses for refusal to answer questions or produce material; it was contemplated that enforcement of such requirements would be by application to the Superior Court under Revised Laws of New Hampshire (1942), Chapter 370, Sections 18 and 19 (now N. H. Rev. Stat. Ann., 1955, Ch. 491, Sec. 19 and 20).[2]

Acting under the above joint resolution the Attorney General, by subpoena dated October 5, 1953, summoned appellant to appear and give testimony at a hearing set for January 8, 1954 (R. 4). On that date appellant appeared before the Attorney General and testified (R. 18-62). Appellant was not accompanied by counsel, his counsel being engaged on that day with another matter (R. 18). Appellant answered a number of questions propounded by the Attorney General, but declined to answer certain others, basing his refusal upon the ground that the questions were irrelevant and invaded his freedom under the First Amendment (see *infra*).

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[2]The Attorney General's authority was extended to June 30, 1957, by New Hampshire Laws of 1955, Chapters 197 and 340. See Appendix A, *infra*, pp. 74 and 75).

On April 30, 1954, the Supreme Court of New Hampshire rendered its decision in *Nelson v. Wyman*, 99 N. H. 33. This case involved another witness, called by the Attorney General in the course of his investigation, who had refused to answer certain questions. Upholding the constitutionality of the resolution relating to the investigation of subversive activities (Laws of 1953, Ch. 307) and, so far as applicable to the case, the Subversive Activities Act of 1951 (Laws of 1951, Ch. 193), and refusing the witness' request to be relieved of answering the questions propounded, the Supreme Court of New Hampshire specifically ruled:

(1) The definition of "subversive person," as used in the two statutes, included persons who were engaging in the specified acts "whether or not done 'knowingly and willfully'" (99 N. H. at 39), and persons who were "members of subversive organizations not knowing them to be such" (99 N. H., at 37).

(2) The Attorney General, when acting under the 1953 Resolution, was exercising the legislative power of investigation, delegated to him by the legislature (99 N. H. at 36-9): "His position as the chief law enforcement officer of the State did not transform the inquiry which was otherwise legislative into executive action" (99 N. H. at 38).

(3) The existence of Federal legislation dealing with subversive activity (the Court referred only to the Smith Act) "does not preclude State legislation on the same subject matter" (99 N. H. at 49). The Court expressly rejected the conclusion reached in *Commonwealth* v. *Nelson*, 377 Pa. 58, the decision later affirmed by this Court in *Pennsylvania* v. *Nelson*, 350 U.S. 497.

On June 3, 1954, appellant was recalled by the Attorney General and, accompanied by counsel, was subjected to further questioning (R. 62-115).

In a prepared statement read at the opening of the first hearing, appellant defined his position with respect to answering questions in the following terms:

> "I have studied the subversive activities act of 1951 with care, and I am glad to volunteer the information that I have absolutely no knowledge of any violations of any of its provisions; further, that I have no knowledge of subversive persons presently located within the state.
>
> "That these statements may carry full conviction, I am prepared to answer certain questions about myself, though in doing so I do not mean to concede the right to ask them. I am also prepared to discuss my views relating to the use of force and violence to overthrow constitutional forms of government.
>
> "But I shall respectfully decline to answer questions concerning ideas, beliefs, and associations which could not possibly be pertinent to the matter here under inquiry and or which seem to me to invade the freedoms guaranteed by the First Amendment to the United States Constitution (which, of course, applies equally to the several states)." (R. 61-2).

During the course of the two hearings, appellant testified, in response to questions of the Attorney General, that he was a socialist and a Marxist (R. 39, 82, 108); that he advocated "the classical conception of socialism—public ownership of the means of production and general economic planning" (R. 41); and that he took the position it was possible to effect the transition to socialism in the United States without force or violence (R. 41-2, 108-10).

Appellant further testified that he was not and never had been a member of the Communist Party (R. 22, 48, 79); that he had never attended any meetings of the Communist Party (R. 22, 48, 78); that he had never contributed to the Communist Party (R. 51); that he did not know any person in New Hampshire

to be a member of the Communist party (R. 21-2, 50, 63-4); that he did not advocate or teach, and never had advocated or taught, overthrow of the government by force or violence (R. 25, 40-1, 70; see also R. 55, 110); that he had not assisted any group which advocated the overthrow of the government by force or violence (R. 25), or known any person or group in New Hampshire who so advocated (R. 25); and that he did not know of any "subversive" activities or any "subversive persons" in New Hampshire, as defined by the New Hampshire statutes (R. 51, 61).

Appellant answered all questons with respect to his membership in and association with various organizations he was questioned about, other than the Progressive Citizens of America and the Progressive Party (R. 24-39, 86-96). He likewise responded to all questions as to whether named individuals were members of the Communist Party or "subversive persons" within the meaning of the New Hampshire statutes (R. 22, 64-6, 77-9, 92-6, 99-103; see also R. 13), and to all questions with regard to Communist influence on organizations with which he had any connection including the Progressive Party (R. 49-50, 91-2, 98-9).

The questions appellant refused to answer fall within three categories: (1) those relating to his lectures at the University of New Hampshire; (2) those relating to the activities of himself and others in the Progressive Citizens of America and the Progressive Party; and (3) those relating to opinion and belief. Appellant's refusal to answer questions in the third group was upheld by the Superior Court (R. 194-5, 208-9), and in this appeal we are concerned only with the questions in the first two groups.[3]

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[3] Actually appellant answered a number of questions dealing with opinion and belief, though still maintaining his right to refuse to do so.

(1) With regard to the lectures, appellant testified that he had, at the invitation of the faculty members conducting the Humanities Course at the University of New Hampshire, delivered a lecture in that course for the past three years (R. 70-2); that in addition he had attended other sessions of the Humanities Course during the same period and participated in discussion (R. 103-4); that neither in his lectures nor at any other time did he "advocate or in any way further the aim of overthrowing constitutional government by force and violence" (R. 70, 105); and that he did not "advocate Communism" in his lectures (R. 105). Appellant refused to answer, expressly upon First Amendment grounds (R. 70, 79-80, 107, 58-62), the following questions:[4]

"Q. What was the subject of your lecture?

"A. I decline to answer the question on advice of counsel and for reasons given by counsel." (R. 205; see R. 70).

"Q. Didn't you tell the class at the University of New Hampshire on Monday, March 22, 1954, that Socialism was inevitable in this country?

"A. I decline to answer that question on advice of counsel and for reasons already stated by counsel." (R. 205; see R. 79, 84, 105).

"Q. Did you advocate Marxism at that time?

"A. I decline to answer the question on advice of counsel and for reasons given by counsel." (R. 206; see R. 105).

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[4]The questions and answers quoted are taken from the proceedings before the Superior Court where the questions at issue here were repeated by the Attorney General after the Superior Court had ordered appellant to answer. References to the place in the record where the questions were originally asked in the proceedings before the Attorney General are indicated by the page numbers following the word "see."

"Q. Did you express the opinion, or did you make the statement at that time that Socialism was inevitable in America? . . .

"A. I decline to answer the question on advice of counsel and for reasons stated by counsel." (R. 206; see R. 105).

"Q. Did you in this last lecture on March 22 or in any of the former lectures espouse the theory of dialectical materialism? . . .

"A. I decline to answer the question on advice of counsel and for reasons given by counsel."

"Q. I have in the file here a statement from a person who attended your class, and I will read it in part because I don't want you to think I am just fishing. 'His talk this time was on the inevitability of the Socialist program. It was glossed-over interpretation of the materialist dialectic.' Now, again I ask you the original question . . .

"A. I decline to answer the question on advice of counsel and for reasons given by counsel." (R. 206-7; see R. 105, 107).

(2) With regard to the Progressive Party and the Progressive Citizens of America (the forerunner of the Progressive Party, R. 64), appellant testified that he did not know of any Communists in the Progressive Party (R. 98-9, 49); that to his knowledge the Progressive Party was not manipulated by Communists (R. 98); and that he had no knowledge of any connection between the Communist Party and the Progressive Party or of any influence exercised by the Communist Party or by Communists over the Progressive Party (R. 49-50; see also R. 36). There was no showing that the Progressive Party or the Progressive Citizens of America had ever used or advocated force or violence to overthrow the government, that said organizations were "subversive organizations" within the meaning of

the New Hampshire statutes, or that said organizations were otherwise unlawful (see R. 13, 98, 131, 189, 218).[5]

Appellant refused to answer, expressly on First Amendment grounds (R. 35, 58-62; see also R. 68), certain other questions relating to the Progressive Party and the Progressive Citizens of America.

The questions and answers were as follows:[6]

> "Q. Was she, Nancy Sweezy, your wife, active in the formation of the Progressive Citizens of America?
>
> "A. I decline to answer the question on advice of counsel and for reasons stated by counsel . . .
>
> "Q. Was Nancy Sweezy then working with individuals who were then members of the Communist Party? . . .
>
> "A. I decline to answer the question on advice of counsel and for reasons stated by counsel." (R. 202; see R. 63).[7]

---

[5]The Attorney General stated in argument before the Superior Court that he had information in his possession showing that five or more members of the Progressive Party, including some of its candidates for election, were or had been members of the Communist Party (R. 189-92; see also R. 36, 97-8). But even this information was never produced in the Sweezy hearing or before the courts (see R. 194).

[6]Again the quotations are from the proceedings before the Superior Court, and the page numbers following "see" refer to the Attorney General's proceedings where the questions were originally asked.

[7]In the original questioning by the Attorney General appellant answered this second question (as to whether Nancy Sweezy was working with members of the Communist Party), saying he did not know any Communist Party members in New Hampshire (R. 63-4). This was consistent with appellant's position throughout the Attorney General's hearings in answering questions about the Communist Party, but not about the Progressive Citizens of America or the Progressive Party except in relation to the Communist Party. Hence the inclusion of this question as being an unanswered one seems to have been an oversight. In any event appellant is ready to repeat his answer if the Attorney General so desires.

"Q. Was Charles Beebe active in forming the Progressive Citizens of America?

"A. I decline to answer the question on advice of counsel and for reasons stated by counsel.

"Q. Did he work with your present wife—Did Charles Beebe work with your present wife in 1947?

"A. I decline to answer the question on advice of counsel and for reasons stated by counsel.

"Q. Was he then a member of the Communist Party. . . .

"A. Mr. Wyman, I told you that I didn't know any members of the Communist Party then or later." (R. 202-3; see R. 64).

"Mr. WYMAN. Yes. 'Mr. Sweezy, where and when did you first know Abraham Walenko?'

"The WITNESS. Want me to read the answer?

"Mr. WYMAN. No, I will read the answers till we get down to the point.

"Answer. 'I think it was in Manchester in 1948 sometime. Question. You don't remember just where you first met him? Answer. No. Question. Have you been to his house in Weare? Answer. Yes. Question. When did you go to his house in Weare? Answer. During 1948. Question. Did it have anything to do with the Communist Party? Answer. No.'

"Q. Did it have anything to do with the Progressive Party?

"A. I decline to answer the question on advice of counsel and for reasons stated by counsel." (R. 203; see R. 67-8).

"Q. Was Charles Beebe active in the Progressive Party in New Hampshire? . . .

"A. I decline to answer the question on advice of counsel and for reasons given by counsel." (R. 205; see R. 99).

Following the hearings the Attorney General, on June 11, 1954, filed a petition with the Superior Court setting forth certain questions appellant had refused to answer and praying that these questions be propounded to appellant by the Court (R. 3-11). The Superior Court, after hearing argument, ruled that appellant must answer the questions relating to his lectures at the University of New Hampshire and to the Progressive Party and the Progressive Citizens of America, but not those relating to opinion and belief (R. 193-5). Appellant was then called as a witness and the Attorney General repeated the questions, to the extent allowed under the Court's ruling (R. 201-8). Appellant persisted in his refusal to answer and the Superior Court thereupon ordered that appellant be "found and adjudged in contempt of this Court" and "committed to the County Jail and there remain until purged of contempt" (R. 208). Appellant was then admitted to bail (R. 208).

Upon appeal the Supreme Court of New Hampshire affirmed the order of the Superior Court, holding that the questions at issue were relevant to the Attorney General's investigation and were not precluded by the First and Fourteenth Amendments of the United States Constitution or by the due process clause of the Fourteenth Amendment (R. 210-22).

On April 4, 1956, following this Court's decision in *Pennsylvania* v. *Nelson*, 350 U. S. 497, appellant filed a further motion for rehearing urging that the New Hampshire statutes involved were invalid as the field had been pre-empted by Federal legislation (R. 224). On April 19, 1956 the New Hampshire Supreme Court denied this motion without opinion (R. 209).

On June 8, 1956 the New Hampshire Supreme Court in a *per curiam* opinion decided *Kalin* v. *Wyman*, reprinted in Appendix B, *infra*, pp. 76-7. In this case, brought by a third witness in the Attorney General's investigation, the Court ruled expressly that the New Hampshire statutes here involved were not invalid

by reason of Federal pre-emption of the field despite this Court's decision in *Pennsylvania* v. *Nelson*. "If state investigation of subversive activities is to be prohibited," said the New Hampshire Supreme Court, "a declaration to that effect must come from higher authority than this Court."

SUMMARY OF ARGUMENT

I

The questions here presented were properly raised under New Hampshire Law and were passed upon by the New Hampshire Supreme Court. The First Amendment issues (Questions 1 and 2) were raised from the beginning, pressed in the New Hampshire Superior and Supreme Courts, and expressly decided by those Courts. The due process issue (Question 3) was raised in the New Hampshire Supreme Court and also expressly decided by that Court.

The pre-emption issue (Question 4) was not raised until the further motion for rehearing, which was denied without opinion. Under the circumstances, however, this was an appropriate and timely method of raising the issue and the New Hampshire Supreme Court, following its liberal practice on raising constitutional issues, would normally pass on the merits of a question thus presented. That it actually did so here is evidenced by a Certificate of that Court, issued January 9, 1957, certifying that it considered and decided the pre-emption issue (App. C; *infra*, p. 78). We therefore submit that this Court has jurisdiction. *Herb* v. *Pitcairn*, 324 U. S. 117, 127-8; *Lisenba* v. *California*, 314 U. S. 219, 221-2; *Cincinnati Packet Co.* v. *Bay*, 200 U. S. 179, 182; *Whitney* v. *California*, 274 U. S. 357, 360-2.

II

The New Hampshire statutes, construed to require appellant to answer the questions concerning his lectures at the University

of New Hampshire, violate appellant's right to freedom of speech under the First and Fourteenth Amendments.

The destructive impact upon freedom of political expression arising from legislative investigations into political affairs has been abundantly demonstrated over the past several decades. It is now clear that this power of legislative investigation is limited by the First Amendment. *U. S.* v. *Rumely*, 345 U. S. 41; *Quinn* v. *U. S.*, 349 U. S. 155. This limitation applies to state as well as federal legislative investigations.

In *Quinn* v. *U. S.* this Court announced the principle that the power of legislative inquiry does not extend to an area in which the government concerned is forbidden to legislate. 349 U. S. at 161. This principle excludes areas where legislation would be forbidden by the First Amendment. Yet it is precisely these areas which the Attorney General seeks to enter here. Appellant answered all questions relating to the use or advocacy of force or violence, and all questions in the borderline area of Communist Party membership, activity and advocacy. But the Attorney General pressed beyond this into the areas of peaceful change and academic discussion. At this point the inquiry transgressed the bounds of legitimate state power and appellant was justified in invoking the First Amendment. *Stromberg* v. *California*, 283 U. S. 359; *DeJonge* v. *Oregon*, 299 U. S. 353; *Taylor* v. *Mississippi*, 319 U. S. 583.

Respondent has attempted to justify this clear invasion of appellant's rights upon the theory that appellant's writings and associations afford grounds for probing into the contents of his lectures; and also that respondent was entitled to test by cross-examination appellant's statements that he did not advocate force and violence. Neither argument can justify respondent's action here. To permit inquiry into protected areas upon the grounds urged would, in practice, open the whole field of political activity and association to legislative inquiry and effectively nullify the First Amendment as a limitation.

Nor can the action of the Attorney General in propounding these questions be sustained on any other standard for applying First Amendment limitations to the power of legislative inquiry. Whether one applies a literal interpretation of the First Amendment, the clear and present danger test, or a balance of interests test the Attorney General's questions would be precluded.

III

The attempt to force appellant to answer the questions concerning the Progressive Party and the Progressive Citizens of America violated appellant's rights under the First and Fourteenth Amendments for substantially the same reasons. The inquiry clearly entered an area foreclosed to state legislation by the First Amendment. Appellant answered all questions relating to the use or advocacy of force or violence and to the Communist Party. The Attorney General attempted to go far beyond this by probing into the peaceful and legitimate activities of political organizations not shown to have engaged in any illegal activity. Such questions are clearly precluded by the "area" test of the *Quinn* case and by other standards of First Amendment limitation.

IV

The New Hampshire statutes also contravene the due process clause of the Fourteenth Amendment in that the power conferred upon the Attorney General is stated in such vague and uncertain language that it is impossible to ascertain its meaning or limit its scope to situations properly within state authority. The Attorney General's power to inquire whether there are "subversive persons" in New Hampshire is particularly sweeping because the New Hampshire Supreme Court has interpreted that term to include persons engaged in specified conduct "whether or not done 'knowingly and willfully'." *Nelson* v. *Wyman*, 99 N. H. 33, 39. The

result, as evidenced by the roving inquiry presented in the record of this case, is that no resident of New Hampshire can be sure where the Attorney General's power ends; nor can he be sure that wholly innocent and well-intentioned conduct on his part will not subject him to investigation and exposure by the Attorney General.

Such uncertainty plainly fails to meet the requirements of due process that legislation must be framed in sufficiently clear terms to permit those subject to it to know "where this new standard of guilt would draw the line between the allowable and the forbidden . . ." *Winters* v. *N. Y.*, 333 U. S. 507, 519; *Lanzetta* v. *N. J.*, 306 U. S. 451; *Musser* v. *Utah*, 333 U. S. 95; *Connally* v. *General Construction Co.*, 296 U. S. 385. The statutes likewise violate due process by arbitrarily imposing sanctions upon persons for innocent membership in "subversive" organizations. *Wieman* v. *Updegraff*, 344 U. S. 183.

V

The New Hampshire statutes are invalid because they deal with the field of national sedition, an area pre-empted by existing Federal legislation. *Pennsylvania* v. *Nelson*, 350 U. S. 497.

The validity of the enabling resolution under which the Attorney General is empowered to investigate (N. H. Laws 1953, Ch. 307) depends upon the validity of the Subversive Activities Act of 1951 (N. H. Laws 1951, Ch. 193). But the 1951 Act, to the extent that it furnishes the basis for the investigation here undertaken, is clearly invalid because it deals only with matters of national sedition. *Pennsylvania* v. *Nelson*, *supra*. Hence the investigation is unauthorized and invalid.

The same result follows even if the 1953 resolution is not dependent on the 1951 Act. The resolution is valid only as an aid to legislation; and since legislation in this field is precluded by

Pennsylvania v. *Nelson* the resolution also fails. If, on the other hand, the resolution has its source in some power of the state legislature other than as an aid to legislation then it operates as a regulation; and regulation in this field through the sanctions of the investigatory process is precluded by *Pennsylvania* v. *Nelson* for the same reasons as state criminal regulation in this field is precluded.

POINT I

THE QUESTIONS HERE PRESENTED WERE PROPERLY RAISED UNDER NEW HAMPSHIRE LAW AND WERE PASSED UPON BY THE NEW HAMPSHIRE SUPREME COURT. THIS COURT THEREFORE HAS JURISDICTION TO CONSIDER THEM.

As noted above, the order of this Court issued October 8, 1956, postponed further consideration of the question of jurisdiction to the hearing of the case on the merits (R. 230). We submit that all the questions here involved were properly raised in the New Hampshire courts and passed upon by the New Hampshire Supreme Court, and that this Court has jurisdiction to consider them.

(1)

The First Amendment issues, both as to questions dealing with the lectures at the University of New Hampshire (Question 1) and the questions dealing with the Progressive Party and the Progressive Citizens of America (Question 2); were raised expressly by appellant as a ground for refusing to answer before the Attorney General (R. 35, 62, 70, 79-80, 107). The issues were likewise expressly raised before the Superior Court in appellant's answer to the Attorney General's petition (R. 17), in argument of counsel for appellant before the Court (R. 137, 198-9), and at the time the questions were again propounded to appellant in the Superior Court (R. 201-8). The Superior Court overruled these objections (R. 195, 208). The First Amendment issues were thereafter raised in briefs and argument before the New Hamp-

shire Supreme Court.[8] And that Court expressly passed on these issues (R. 220-2).

(2)

The Fourteenth Amendment due process issue (Question 3) was first raised by appellant in his brief before the New Hampshire Supreme Court. Appellant argued that, "while due process cannot be defined with precision, and each case must stand on its own facts (*Fitzgibbons* v. *Hancock*, 97 N. H. 162, 164), procedural regularity requires that the 1951 and 1953 Acts as construed and applied be held unconstitutional, since they leave room for the play and action of purely personal and arbitrary power." The Supreme Court of New Hampshire expressly ruled on the due process issue in its opinion, saying:

> "The resolution authorizing the investigation is not so vague and lacking in standards as to violate the defendant's right to due process. . . . The sections of the act to which reference is made [the 1951 Act], and with which the circumstances of this case are concerned, define subversive organizations and persons (RSA :555, 1) and the acts of advocacy and teaching (*Id.* 2(b)) and participation in a subversive organization (*Id.* 2(d)) which are made criminal with sufficient clarity to satisfy the requirements of due process. *Nelson* v. *Wyman*, 99 N. H. 33." (R. 219-220).

(3)

The issue with respect to whether the State of New Hampshire is precluded by the existence of Federal power and statutes from

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[8]Appellant's Bill of Exceptions took a general exception to the rulings of the Superior Court, not referring specifically to constitutional issues (R. 1-3). Under New Hampshire practice the failure to mention specific constitutional objections in the Bill of Exceptions did not preclude appellant from raising any such issues in the New Hampshire Supreme Court. See, *e.g.*, the procedure with reference to the due process issue, *infra*.

legislating or investigating in the area of sedition (Question 4) was not raised until the second (or further) motion for rehearing (R. 224), which was denied without opinion (R. 209). The circumstances were these:

Prior to the second hearing before the Attorney General (the first at which appellant was represented by counsel) the Supreme Court of New Hampshire decided *Nelson* v. *Wyman*, 99 N. H. 33, referred to above. This case, arising out of the same investigation being conducted by the Attorney General but involving another witness, squarely ruled against the contention that the investigation was precluded by Federal occupancy of the field of sedition. 99 N. H. at 48-9 The issue was thus settled adversely to appellant by the highest court of the State, and counsel for appellant did not raise it again in the Superior Court.

After the Supreme Court of New Hampshire had decided the instant case, and after it had denied the first motion for rehearing, this Court decided *Pennsylvania* v. *Nelson*, 350 U. S. 497. The decision in the Pennsylvania *Nelson* case for the first time opened the possibility that the New Hampshire Supreme Court would revise or reconsider its position in the New Hampshire *Nelson* case. Counsel for appellant immediately filed the further motion for rehearing based solely on this Court's decision in the Pennsylvania *Nelson* case.

This further motion for rehearing conformed to the New Hampshire practice for presenting an issue of this nature under the circumstances involved. The New Hampshire Supreme Court has frequently passed on constitutional issues raised for the first time in that Court. As just pointed out, it followed this practice in passing on the due process issue in this case, raised for the first time in appellant's brief. It has also followed an extremely liberal practice in allowing constitutional issues to be raised at any time

in the proceedings before it."[9] Thus the further motion for rehearing was an appropriate and timely method of calling the Court's attention to the new issue brought into the case by this Court's decision in *Pennsylvania* v. *Nelson*, and the normal practice of the New Hampshire Supreme Court was to consider such issues on the merits.

That the New Hampshire Supreme Court, in denying the further motion for rehearing, did in fact pass on the merits of the pre-emption issue is now completely clear from the Certificate issued by the Court on January 9, 1957, at appellant's request. This Certificate, which has been filed with the Clerk of this Court, is printed in full in Appendix C to this brief (*infra*, p. 78). It states:

> "This is to certify that the Supreme Court of the State of New Hampshire considered upon its merits the further motion for rehearing filed on behalf of the defendant Paul M. Sweezy in the action entitled, *No. 5395, Louis C. Wyman, Attorney General* v. *Paul M. Sweezy*. This motion raised the question of supersession of RSA Chapter 588 and Chapter 307, Laws of 1953 by federal occupation of the field to the exclusion of parallel state legislation after *Commonwealth of Pennsylvania* v. *Steve Nelson*, 350 U. S. 497 (1956) was decided. After due consideration, the Court unanimously denied the further motion for rehearing because it is not

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[9]Thus in *Ashuelot R. R. Co.* v. *Elliot*, 58 N. H. 451, the Court entertained and passed upon a motion for rehearing involving a constitutional issue that had been decided several years before. In *State* v. *Rheaume*, 80 N. H. 319, the Court stated the principle that "the constitutionality of a statute authorizing a prosecution involving the punishment for crime may be questioned at any stage of the proceedings" (80 N. H. at 322). And in *Duncan* v. *Jaffrey*, 98 N. H. 305, where the plaintiff sought to raise a constitutional issue as to the validity of a state tax but brought the wrong form of proceeding, the Court nevertheless proceeded to a decision on the merits. See also *Stebbins* v. *The Lancaster Ins. Co.*, 59 N. H. [illegible]; *Farrell* v. *Johnson*, 86 N. H. 530.

satisfied that the *Nelson* case, *supra*, purports to preclude a state legislative investigation of subversive activities. See, *Gordon Kahn* v. *Louis C. Wyman, Attorney General*, decided June 8, 1956, 100 N. H."

In view of these circumstances, and particularly in view of the Certificate, we submit that this Court has jurisdiction to decide the pre-emption issue. *Herb* v. *Pitcairn*, 324 U. S. 117, 127-128; *Lisenba* v. *California*, 314 U. S. 219, 221-222; *Cincinnati Packet Co.* v. *Bay*, 200 U. S. 179, 182; *Whitney* v. *California*, 274 U. S. 357, 360-362.

Furthermore the precise views of the New Hampshire Supreme Court on the issue are not in doubt. On June 8, 1956, subsequent to the denial of appellant's further motion for rehearing, the Court passed again—this time with an opinion—upon the pre-emption issue. *Kahn* v. *Wyman*, 100 N. H. ——, reprinted in Appendix B, *infra*, p. 76. In that case a third witness called by the Attorney General in the course of his investigation filed a petition in the Superior Court to quash the subpoena, basing his motion on *Pennsylvania* v. *Nelson*. The New Hampshire Supreme Court upheld the lower court's dismissal of this petition, saying:

"In the present case, however, the issue is whether or not the *Nelson* case precludes the Legislature of the state from conducting investigations of subversive activities within the state as distinct from providing for the prosecution of crimes. While it is not clear what a state legislative investigation of subversive activities may accomplish at the present time, we are not satisfied that the *Nelson* case, *supra*, purports to preclude such an investigation. If state investigation of subversive activities is to be prohibited, a declaration to that effect must come from higher authority than this court. We know of no decision of any court which has ruled that the investigative aspects of state subversive activities legislation have been preempted by the federal government. We therefore conclude that the Trial Court was correct in dismissing this petition."

It should be added that respondent in this case does not contend that the Supreme Court of New Hampshire did not pass on the pre-emption issue or that this Court should decline jurisdiction for that ground. See Motion to Dismiss, p. 10.[10]

[10] It will be noted also that the issue is before the Court in a somewhat different aspect, in connection with the First Amendment issues. (See *infra*, pp. 40-1).

POINT II

THE NEW HAMPSHIRE STATUTES, CONSTRUED TO REQUIRE APPELLANT TO ANSWER THE QUESTIONS CONCERNING HIS LECTURES AT THE UNIVERSITY OF NEW HAMPSHIRE, CONTRAVENE THE FIRST AMENDMENT AS APPLICABLE TO STATE ACTION UNDER THE FOURTEENTH AMENDMENT.

The effort to force appellant to answer the questions concerning his lectures at the University of New Hampshire presents the issue of freedom of speech in one of its most significant and sensitive aspects—the area of academic freedom. In essence the attempt of the New Hampshire legislature, acting through its agent the Attorney General, was to bring the potent sanctions of the state investigatory power to bear in hampering and repressing academic discussion of socialist and Marxist theory. Such conduct on the part of a state government runs directly counter to the principles of free expression which underlie our democratic form of government and which are embodied in the First and Fourteenth Amendments as consistently interpreted by the decisions of this Court.

A. The Power of State Legislative Investigation is Limited by the First Amendment as Incorporated in the Fourteenth Amendment.

The Supreme Court of New Hampshire expressly acknowledged that "the inquiries authorized by the Legislature in connection with this investigation concerning the contents of the lectures . . . undoubtedly interfered with the defendant's free exercise of those liberties" of speech and association guaranteed by the Federal Constitution (R. 220). Of this there can be no question. But it is essential to recognize—as the New Hampshire Court did not—the full extent of such interference and its implications for political freedom in the United States today.

Our experience during the last several decades has fully demonstrated the destructive effect of an unchecked power of legislative inquiry upon freedom of political expression. The power to call persons before an official investigating body, to subject them to the burdens and strains of justifying their political ideas or conduct before experienced and hostile interrogators, and to expose them to the impact of an aroused public opinion, furnishes a legislative committee with sanctions of striking effectiveness in curtailing political activities, associations and opinions. Modern legislative committees, through improved methods of investigation, more expert manipulation of publicity, larger and permanent staffs, and similar advances in technique, have enormously enlarged the original power and given it in effect an institutional framework. These developments have taken place at a time when the individual, by reason of greater economic dependence and other pressures to conform, has become far more vulnerable to the kind of sanctions wielded by a legislative committee. The result has been, it is fair to say, that within the last two decades legislative investigating committees have had as great or greater impact upon freedom of political expression in the United States as any other government institution or measure.

The extent to which the power of legislative investigation can and does abridge freedom of political expression has been stressed by many students of the problem. In a recent study in the very area of concern here—freedom of thought and action in the academic community—Professor Robert M. MacIver summarized the effect of legislative committee investigations in the following words:

> "Finally, they have been largely responsible for the spirit of apprehension and the sense of intimidation that, according to a considerable amount of testimony, has invaded the halls

of learning." MacIver, *Academic Freedom in Our Time* (1955), p. 49.[11]

What has not been so generally recognized is the extent to which the power of legislative investigation, when employed as a sanction to control political activity and opinion, violates the most fundamental structural principles of American government. It does so because it combines legislative, executive and judicial functions in an extreme and dangerous form. An investigating committee exercises legislative powers in that it may deal with broad issues of policy, extending over the whole field of potential legislative action, and may be given authority to study and formulate new measures in any such area. It exercises executive functions in its power to initiate proceedings in a particular situation or against a particular person, to investigate facts, to commence what amount to a prosecution, and to conduct such prosecution through the presentation of evidence by members of its own staff. It exercises judicial functions in that it determines what evidence will be admitted, makes a formal judgment on the case, and promulgates an official decision. All of this takes place in the absence of most

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[11] For similar judgments of the impact of legislative investigations upon freedom of thought and expression in the United States, see Lawrence H. Chamberlain, *Loyalty and Legislative Action* (1951), pp. 203-6, 216-21; Walter Gellhorn, *The States and Subversion* (1952), pp. 385-8; Robert K. Carr, *The House Committee on Un-American Activities* (1952), Ch. XII; Alan Barth, *Government by Investigation* (1955), Ch. I, pp. 163-79; Telford Taylor, *Grand Inquest* (1955), Ch. VI and X; Robert E. Cushman, *Civil Liberties in the United States* (1956), pp. 177-201; Zechariah Chafee, Jr., *The Blessings of Liberty* (1956), pp. 84, 234-5, 242-5, 250-2. A recent account of the operations of legislative committees, citing the major decisions and literature, may be found in Comment, *Legislative Inquiry Into Political Activity: First Amendment Immunity From Committee Interrogation*, 65 Yale L. J. 1159 (1956).

of the procedural protections against arbitrary or unjust action available in ordinary judicial or administrative proceedings.[12]

This aspect of legislative investigations in dramatically illustrated by the present case. Here the chief prosecuting official of the state is acting as agent of the legislature in the conduct of the investigation.

One of the main efforts of the framers of the Constitution was to avoid the very kind of dangerous assemblage of powers which now appears in the recent development of legislative committee investigations. The basic separation of legislative, executive and judicial functions, and the whole system of checks and balances, were devised to prevent concentration of power, with its attendant abuse, such as had already appeared in some of the state legislatures. The specific prohibition against bills of attainder reflected the same purpose. And this Court has consistently interpreted the Constitution in this spirit. Thus, in the first major treatment of the power of legislative inquiry the Court recognized the danger arising from legislative incursions into the judicial realm and rejected the asserted power on this ground. *Kilbourn* v. *Thompson*, 103 U. S. 168, 182, 190-6. Again, in *In re Oliver*, 333 U. S. 257, the Court found the combination of prosecuting and judicial functions, operating in the absence of basic safeguards, a plain infringement of fundamental constitutional rights. *Cf. Tenney* v. *Brandhove*, 341 U. S. 367.

The present development of legislative committees brings to the fore again this basic problem in the vital field of political expression. The ordinary rules of relevancy or pertinency cannot afford adequate protection. Considered by themselves, these rules would allow virtually unlimited scope to a legislative committee operating under a carefully drafted enabling resolution. Under the

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[12]For discussion of this aspect of the problem see Alan Barth, *Government by Investigation* (1955), esp. Ch. I; Telford Taylor, *Grand Inquest* (1955), Ch. V.

guise of looking for "subversives," a legislative committee could employ the now highly developed investigating process to search out and punish nearly every unorthodox political opinion, activity or association. This tendency toward expansion under the ordinary rules of legal relevancy has marked the progress of legislative committees in recent years, as numerous observers have documented in detail.[13]

Plainly it would be wholly inconsistent with all our notions of balanced and orderly government to permit an institution combining all forms of state power to apply the devastating sanctions of official publicity and exposure over a nearly limitless field of operation. This Court, even in days before the full implications of the legislative power to inquire had become manifest, has consistently taken the position that the power is subject to limitation. *Kilbourn* v. *Thompson*, 103 U. S. 168, 190, 194-5; *McGrain* v. *Daugherty*, 273 U. S. 135, 173-4; *Sinclair* v. *U. S.*, 279 U. S. 263, 292. In the area with which we are concerned here the most significant restriction is that embodied in the First Amendment.

That the power of legislative inquiry is limited by the countervailing command of the First Amendment is, indeed, no longer open to doubt. In *U. S.* v. *Rumely* the Court expressly recognized that the First Amendment constituted a limitation upon legislative powers to investigate, although it abstained "from marking the boundaries of congressional power or delimiting the

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[13] See, *e.g.*, the materials collected in the dissent of Judge Clark in *U. S.* v. *Josephson*, 165 F. 2d 82 (C.A. 2), and in the dissent of Judge Edgerton in *Barsky* v. *U. S.*, 167 F. 2d 241 (C.A.D.C.); August R. Ogden, *The Dies Committee* (1945); Robert K. Carr, *The House Committee on Un-American Activities* (1952); Walter Gellhorn, *The States and Subversion* (1952), pp. 7-18, 61-88, 288-312, 328-46, 385-8; Telford Taylor, *Grand Inquest* (1955), pp. 159-73; Zechariah Chafee, Jr., *The Blessings of Liberty* (1956), pp. 85-7; *U. S.* v. *Rumely*, 345 U. S. 41, 54.

protection guaranteed by the First Amendment" (345 U. S. 41, 48). And in *Quinn* v. *U. S.*, the Court took pains to point out:

> "But the power to investigate, broad as it may be, is also subject to recognized limitations. It cannot be used to inquire into private affairs unrelated to a valid legislative purpose. Nor does it extend to an area in which Congress is forbidden to legislate . . . Still further limitations on the power to investigate are found in the specific individual guarantees of the Bill of Rights . . ." 349 U. S. 155, 161, footnotes omitted.

It is true that these cases involved Federal rather than state power of legislative inquiry. But it can hardly be doubted that the requirements of the First Amendment, made applicable to the states through the Fourteenth Amendment, impose comparable or identical limits on state power.

The exact point at which the First Amendment comes into play as a limitation upon legislative investigating authority has not been clearly marked out. We consider below several alternatives. But wherever that line may eventually be drawn, we submit that the Attorney General of New Hampshire has overstepped it in this case.

B. The Questions Dealt With An Area of Political Expression Clearly Protected By The First Amendment and Hence Excluded From the State's Power of Inquiry.

(1)

The clearest and simplest statement of the point at which the First Amendment cuts across the power of legislative inquiry is that enunciated in the *Quinn* case: The power does not extend to an area in which the government is forbidden to legislate. 349 U. S. at 161. This doctrine clearly applies to state investigations, at least where the investigating process itself, as just demonstrated, constitutes an infringement upon First Amendment rights. The

principle thus excludes state investigation into areas where state legislation would be prohibited by the First and Fourteenth Amendments.

While application of this principle to a concrete situation might be difficult in some cases, it is not so here. The questions propounded by the Attorney General with respect to appellant's lectures clearly embrace a field of political expression where the First Amendment prohibits legislation. The New Hampshire statutes which purport to authorize such interrogation must therefore be held to violate the constitutional guarantee.

No one questions the power of a state legislature, subject to pre-emptive Federal power, to enact legislation prohibiting the use of force or violence to overthrow, destroy or alter constitutional forms of government. We may assume further that, at least under the conditions described in *Dennis* v. *U. S.*, 341 U. S. 494, and again subject to pre-emptive Federal power, a state may proscribe the advocacy of force or violence for such purposes, whether by individuals or by organizations. Into these areas the legislative power of inquiry, under the "area" test, extends. But the state clearly has no power, by reason of the First and Fourteenth Amendments, to prohibit or harass political activity or expression which is directed toward political or social change through peaceful democratic methods. *Stromberg* v. *California*, 283 U. S. 359; *DeJonge* v. *Oregon*, 299 U. S. 353; *Taylor* v. *Mississippi*, 319 U. S. 583. Nor has it any power to prevent academic discussion of political and social issues, even where the discussion may relate to doctrines of force and violence. *Dennis* v. *U. S.*, 341 U. S. 494, 501-2. From these sectors the state's investigating power, with its enormous capacity for restraint and suppression, is excluded.

Yet it is precisely these forbidden areas that the Attorney General of New Hampshire seeks to enter in pressing for an answer to the questions here at issue. Appellant answered all questions relating to the use or advocacy of force or violence.

Appellant also answered all questions in the borderline area of Communist Party membership, activity and advocacy, in deference to the legislative finding in the 1951 Act that the Communist Party advocated force and violence. Having received an answer upon these issues, the Attorney General proceeded to inquire into the area of peaceful and academic discussion—what the contents of the lectures were, whether appellant had stated that socialism was inevitable, whether he had advocated Marxism, whether he espoused the theory of dialectical materialism. At this point the inquiry had plainly transgressed the bound of legitimate state power and appellant was justified in invoking the First and Fourteenth Amendments.

The distinction which appellant invoked here—between political activity conducted through normal democratic procedures and political activity relying upon force or violence or similar anti-democratic methods—is fundamental to the maintenance of free political expression in a democracy. Particularly in times such as the present, when internal and external forces have led both Federal and state governments to adopt new and far-reaching controls over political activity in the interest of security, it is essential that the distinction be clearly recognized and firmly enforced. If the First Amendment is to have any meaning the government must not be allowed to use its legitimate interest in protecting existing institutions against change by force or violence as an excuse for preventing peaceful and lawful discussion of change. And it is as important that the sanctions of legislative investigation be not employed for this purpose as it is that outright prohibition through criminal sanctions be confined to its proper field.

The failure of the New Hampshire Supreme Court to hold the state legislature within the traditional bounds clearly resulted in the curtailment of legitimate political expression in the case now before the Court. Appellant's right to discuss the principles of socialism without state interference or harassment was gravely

impaired. That the Attorney General's action had a serious effect upon faculty members and students at the University of New Hampshire cannot be questioned. The simple fact is that freedom of discussion throughout the whole academic community was deliberately and directly abridged. The First Amendment was designed to prevent the use of government power for such purposes.

(2)

Respondent has attempted to justify the clear invasion of protected rights in this case upon two theories. One is that appellant's previous writings and associations afford grounds for probing into the contents of his lectures. The other is that respondent was entitled to test by further questions, in the nature of cross-examination, appellant's statements that he did not advocate force and violence in his lectures. Neither theory, we submit, can justify the Attorney General's line of inquiry here. On the contrary, to permit such incursions into protected areas of free speech upon the grounds urged would strip the First Amendment of its force and leave the power of legislative inquiry virtually without limitation.

The argument based upon appellant's writings can be disposed of summarily. Out of appellant's numerous and extensive publications respondent cites one extract which he asserts "comes as close to indirect advocacy of force and violence as it's possible to come" (R. 127; see also Motion to Dismiss, p. 7). The extract appears in the record at pages 82-3. The passage contains an analysis of the use of violence in political affairs generally, concluding that it has more justification where employed to further socialist objectives than where used in support of capitalist objectives. But it condemns violence in both systems: "We hate it, as we hate all violence" (R. 83). There is no intimation whatever that appellant is urging or suggesting the use of violence to overthrow government in the United States. The passage is

plainly within the realm of academic discussion and can afford no justification for opening up the whole area of appellant's lectures and speeches to the Attorney General's interrogation.[14]

As to appellant's associations respondent has relied upon the fact that, as appellant freely testified, he was a member or participated in the activities of a number of organizations on the United States Attorney General's list (promulgated under the Federal loyalty orders) or cited by the House Committee on Un-American Activities as "subversive" (R. 23-39, 52-3, 86-92).[15] There is no suggestion that any of these organizations ever engaged in force or violence or advocated it or otherwise participated in any unlawful activity. Nor can any inference of unlawful activity on the part of appellant be drawn from his association with such organizations. See *Schneiderman* v. *U. S.*, 320 U. S. 118; *U. S.* v. *Remington*, 191 F. 2d 246, 252 (C.A. 2); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123; *Wieman* v. *Updegraff*, 344 U. S. 183. In any event no one would assert that association with such groups, even if they were engaged in illegal activity, can deprive appellant of his right to express his views in accordance with democratic procedures or can deprive his hearers of the right to listen to such discussion. This is the clear ruling of *DeJonge* v. *Oregon*, 299 U. S. 353. See also *Herndon* v. *Lowry*, 301 U. S. 242; *Stromberg* v. *California*, 283 U. S. 359.

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[14] The Attorney General also supports his argument by references to a translation made by appellant of a pamphlet by Friedrich Engels entitled *Principles of Communism* (R. 74-7, 164-5), and the quotation by appellant in his *Monthly Review* of an extract from an article by Archibald MacLeish originally published in the *Atlantic Monthly* (R. 54-5, 167-9; see also R. 169-70). Neither reference can furnish the slightest support for any contention that appellant advocated force and violence. For a statement of appellant's views on the subject see R. 55, 109-10.

[15] Appellant testified that at the time of the hearings he was not a member of any organization on the Attorney General's list (R. 24, 87, 96).

To hold that appellant loses his rights under the First Amendment upon this ground would mean that millions of Americans who participated at one period or another in the activities of hundreds of organizations so listed would thereby be compelled to answer to legislative committees as to every phase of their political life and expression. No such sweeping powers can be accorded legislative committees within the framework of the First Amendment.

Respondent's other contention is that the questions asked were proper in order to test the validity of appellant's statement that he did not advocate overthrow of the government by force and violence in his lectures. In his Motion to Dismiss the Attorney General described the nature and purpose of his proposed cross-examination in the following terms:

> "Did this witness tell students at the University of New Hampshire in this lecture that Red China was a land of peace, and Formosa a land of war; that the Soviet Union and world communism wanted peace, whereas the barons of Wall Street want war; that the only way to assure world peace was to lay down our arms and become one world with communism, living under a socialistic, classless society with the profit motive removed? Was all of this, if said (and no contention is made here that it was in fact said, but these propositions are discussed merely for reaching the possibilities raised by the Appellant himself) was it all part of a plan to orient our youth toward abolition of a constitutional republic with approval of violence for these purposes but not of violence in defense of capitalism?" (p. 11).

We submit that "cross-examination" on such issues, under the guise of discovering whether appellant had advocated force and violence in his lectures, clearly abridges appellant's rights under the First Amendment.

The record contains no evidence from any source that appellant had avocated force and violence in his lectures. Appellant repeat-

edly and unequivocally denied it. The only justification the Attorney General can advance for pursuing further the subject matter of the lectures is that one extract from appellant's writings plus his associations might make it possible that appellant through a "subtle approach" had advocated force and violence "by indirection" (Motion to Dismiss, pp. 12, 9). It is true that the New Hampshire Supreme Court did find that the questions appellant refused to answer were "relevant" under the enabling statutes. But this holding does not meet the issue here. Whether relevant or not under the New Hampshire statutes the questions could not be asked if they fell within the ban of the First Amendment.

This is the usual rule pertaining to cross-examination. Relevant cross-examination would not be permitted, for example, where it conflicted with the right of a witness to remain silent by reason of the privilege against self-incrimination under the Fifth Amendment. Nor would it overcome such countervailing rights as are embodied in the attorney-client privilege, or the husband-wife privilege. The same result follows where the cross-examination would impinge upon First Amendment rights.

Cross-examination as a means for establishing the validity of answers given in a legislative inquiry is not of such vital importance in the finding of facts essential for legislative action that it can override constitutional limitations. Nor is it the only method open to a state for assuring truthfulness in answers or testing their accuracy. Specifically, a prosecution for perjury is an adequate and constitutional device for achieving this purpose and assuring the integrity of the process of legislative investigation.

The issue becomes wholly clear, we submit, if the implications of the Attorney General's position are examined. On his theory of the First Amendment he could call any person in New Hampshire (or at least any person who had been associated with a listed organization) and ask the question: "Have you ever advocated overthrow of the government by force or violence?" If the wit-

ness answered "No," then the Attorney General, in order to "test" the answer, could require the witness to testify about all his statements concerning Red China, the Korean War, the Hungarian revolution, the Middle East, economic planning or almost any other political subject. There would be no limit to the possible interrogation, regardless of its effect upon free expression and association.

Furthermore, the range of inquiry thus opened up would not be confined to the area of "subversive activities." Thus, on respondent's theory a legislative committee in a southern state could call a group of Negroes before it and ask whether they had ever engaged in champerty or maintenance. Upon receiving a negative answer, the committee could then "test" the reply by forcing the witnesses to answer an exhaustive series of questions concerning their statements on the segregation issue, their relations with the National Association for the Advancement of Colored People, and a host of similar matters. Surely no such inquisition could be consistent with the protections of the First Amendment.

(3)

It should be noted that the treatment of the First Amendment question in the decision of the New Hampshire Supreme Court was both incorrect in theory and did not reach the issues of the case. That Court took the position that a state legislature may conduct an inquiry whenever in its judgment it finds that a "danger is reasonably represented as potential" (R. 221). This doctrine is patently in conflict with the principle of the *Quinn* case that the power of investigation may not extend to an area foreclosed to legislation under the First Amendment. Furthermore no "danger" within the power of the state to control—whether clear, present or potential—arises from the speech of individuals seeking to discuss public issues by methods of peaceful persuasion. Hence the rule enunciated by the New Hampshire Court cannot control the issues here.

The New Hampshire Court, moreover, in applying the doctrine to the facts before it completely failed to reach the real problem. It ruled that the questions were relevant under the enabling statutes without considering First Amendment limitations. Then it ruled that the First Amendment did not prohibit inquiry into the potential danger of overthrow of the government by force or violence. But it never addressed itself to the issue of whether the First Amendment cut off at any point the questions now at stake, which did not directly relate to force and violence but went far beyond into other areas.

For similar reasons the inquiry here cannot be justified upon the theory that a state may restrict speech where the speech creates a clear and present danger of a substantive evil, and may therefore investigate to determine whether such a clear and present danger exists. The questions involved here did not deal with any "danger" the state had a right to prevent, but with peaceful discussion of political change. To bring such questions under the cover of inquiring into the existence of a clear and present danger from use or advocacy of force and violence is to expand the clear and present danger exception to a point where it would nullify the whole First Amendment protection. See the dissent of Judge Clark in *U. S. v. Josephson*, 165 F. 2d, 82, 97-8; *Attorney-General v. Colonial Sugar Refining Co.*, [1914] A.C. 237, 252-7.

(4)

There is a final reason why the First and Fourteenth Amendments prevent the State of New Hampshire from carrying its investigation into the area here involved. Such inquiry, as we have seen, seriously infringes freedom of expression. It can be justified, if at all, only if the state has a substantial legislative interest in the field of inquiry. If such interest is insubstantial or non-existent it clearly cannot outweigh or prevail against the protection afforded by the First and Fourteenth Amendments. See *U. S. v. Rumely*, 345 U. S. at 44, 46.

In this case the State of New Hampshire has no such legislative interest to interpose as a counterbalance to the principles of the First Amendment. Both the 1951 and the 1953 statutes dealt with the problem of sedition directed against the country as a whole. It was this problem also with which the Attorney General was specifically concerned in the investigation of appellant. Under the ruling of this Court in *Pennsylvania* v. *Nelson*, 350 U. S. 497, the field of national sedition is one foreclosed to state legislative action. Consequently the problem of accommodating "contending principles," as Mr. Justice Frankfurter expressed it in the *Rumely* case, disappears. The First Amendment remains as the single applicable principle and its mandate must prevail.[16]

C. The Questions Are Not Permissible Under Other Theories of the First Amendment's Limitation Upon Legislative Investigation.

In view of the clear statement of this Court in the *Quinn* case and because the area theory of limitation seems well designed to safeguard the values embodied in the First Amendment, we place our chief reliance upon that doctrine as disposing of the issues of this case. Other theories have been advanced, however, for fixing the point at which the First Amendment limits the power of legislative investigation and we therefore discuss them briefly. We submit that under any of these doctrines the questions asked by the Attorney General concerning appellant's lectures fall within the proscription of the First Amendment.

Literal Interpretation of the First Amendment

If we accept a literal interpretation of the First Amendment that a state may make *no* law abridging freedom of speech—then the issue is readily settled. For reasons already stated, the

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[16]For a more detailed discussion of the pre-emption issue as a separate ground of objection, see Point V, *infra*.

action of the New Hampshire legislature substantially abridges freedom of speech. And appellant would be clearly within his constitutional rights in refusing to answer.

The Clear and Present Danger Doctrine

A standard often used in delineating the application of the First Amendment is the clear and present danger test. Under this test, the government may impose restrictions upon speech only where the speech involved creates a clear and present danger of a substantive evil the government has a right to prevent. *Schenck* v. *U. S.*, 249 U. S. 47; *Dennis* v. *U. S.*, 341 U. S. 494.[17] The test would seem equally applicable to a restriction which takes the form of sanctions inherent in legislative investigations into speech as to a restriction which takes the form of a direct criminal prohibition of speech. Applying this test to the facts of this case the issue would be whether the speech inquired about—appellant's lectures at the University of New Hampshire—created a clear and present danger (or a probable danger) of overthrow of the government by force and violence.

There is no showing in this record suggesting the existence of such a danger. On the contrary the record contains the direct testimony of appellant that there was no advocacy of force and violence whatever. The only other evidence in the record on the point confirms appellant's statement (R. 159; 175, 177-9, 196-7). Appellant's prior writings and associations, upon which respondent relies, supply no inference that appellant ever advocated force or violence at the University of New Hampshire or anywhere else. On this state of the record, in the absence of some substantial ground for believing that force and violence were advocated in

[17] The prevailing opinion in the *Dennis* case accepted a modified formulation of the clear and present danger test. 341 U. S. at 510. For purposes of this case the difference, if any, does not appear material.

the lecture, there is no support for a contention that the speech created any kind of danger. All that took place, as far as the record shows, was academic discussion of socialism and this, as stated above, neither constitutes a "danger" to the state nor creates "a substantive evil" the state has a right to prevent.

Even if we assume—contrary to every indication in the record—that appellant's lectures did include advocacy of force and violence there would still be no showing sufficient to meet the test. Surely no one would contend that appellant's lectures on socialism, which he had been invited to give by a group of faculty members over a period of three successive years, could by any stretch of the imagination create a clear, present or probable danger of overthrow of the government by force or violence.

Balancing of Interests

Another theory of the First Amendment is that the interests of the state in restricting speech must be balanced against the social values in maintaining freedom of speech. As applied in this case the issue would be whether the interest of New Hampshire in obtaining information as a basis for legislation designed to prevent overthrow of the government by force and violence outweighed the social costs of interfering with freedom of discussion at the University and throughout the state. The various factors could be weighed in light of a presumption in favor of legislative action, or a presumption in favor of the First Amendment, or in the absence of any presumption.

Whatever the presumption may be, we believe that any such balance here must be struck in favor of preserving First Amendment rights. The value to the State of New Hampshire in framing anti-sedition legislation upon a basis of a knowledge of appellant's lectures on socialism seems small. In his Motion to Dis-

miss the Attorney General explained the interest of New Hampshire as follows:

> "Adolescents in most instances cannot be in a position to adequately evaluate doctrinal presentations either from experience in life or scholarly research. They are just not old enough to know whether it is really true that a nation is good or a political philosophy is good or whether they are evil. For an admitted Marxist to flatly state to assembled youth that socialism in the United States is inevitable, raises all manner of relevant questions particularly after the earlier characterizations by Appellant of what he meant by use of the term. It makes little difference that the statement may have been enveloped in the pedagogical pretense that it was set up as one man's point of view, knock it down if you can. It is certainly competent and entirely relevant to ask whether such a Marxist in fact explained to the class what he meant them to understand by the word 'Socialism'." (p. 8).

It is doubtful that a full exposure of this scene at the lecture would assist the New Hampshire legislature much in drafting valid legislation on sedition. As against this interest, such as it is, there must be set the impact upon the political health of the State in making serious academic discussion of socialism an occasion for official inquiry and public denunciation by the chief prosecuting official of the State acting as agent for the chief policy making organ of the State.

Furthermore, as pointed out above, under this Court's decision in *Pennsylvania* v. *Nelson*, 350 U. S. 497, the State of New Hampshire would have no power to legislate on the issues of subversion which the Attorney General was here undertaking to investigate.

In either event the balance must be struck in this case against the use of the investigating power and in favor of the First Amendment.[18]

D. Conclusion.

It should be emphasized that the issue here does not concern the extent of control which a state legislature may exercise over the curriculum of a state university or the qualifications for teachers at such a university.[19] Appellant was not a member of the faculty of the University of New Hampshire nor a state employee (R. 104). Except so far as the New Hampshire statutes dealt with the loyalty of state employees generally, they did not purport to deal with problems of educational policy. Nor did the Supreme Court of New Hampshire consider the case to involve such issues (R. 216). The authority of the Attorney General was to search for violations of the Subversive Activities Act, and to discover whether there were any "subversive persons" in the state. He had no power, and did not undertake to exercise any, to inquire into the curriculum of the University or the manner of teaching.

But the action of the Attorney General did gravely affect freedom of speech throughout the academic community and indeed throughout the State. The question under discussion in appellant's lectures is one of the most vital facing the nation today. Socialism and Marxism in all their many variants and shadings, whatever their merits, represent some of the most significant

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[18] For development of a further theory of First Amendment limitation see Comment, *Legislative Inquiry Into Political Activity: First Amendment Immunity From Committee Interrogation*, 65 Yale L. J. 1150 (1956).

[19] Cf. *Scopes* v. *State*, 154 Tenn. 105, 289 S. W. 363; *Meyer* v. *Nebraska*, 262 U. S. 390; *Pierce* v. *Society of Sisters*, 268 U. S. 510; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624.

intellectual forces of our time. Americans must strive to study and understand them. It is impossible to study a set of doctrines without knowing what those who believe in their validity, and hence in a real sense advocate and teach them, understand them to mean. If the investigating process can be used to make it difficult or impossible for adherents to expound these doctrines and for students and others to have them expounded; as happened in this case, then the whole public purpose of the First Amendment is defeated.

POINT III

THE NEW HAMPSHIRE STATUTES, CONSTRUED TO REQUIRE APPELLANT TO ANSWER THE QUESTIONS CONCERNING THE PROGRESSIVE PARTY AND THE PROGRESSIVE CITIZENS OF AMERICA, SIMILARLY CONTRAVENE THE FIRST AMENDMENT AS APPLICABLE TO STATE ACTION UNDER THE FOURTEENTH AMENDMENT.

The attempt to force appellant to answer questions concerning the Progressive Party and the Progressive Citizens of America presents issues very similar to those just discussed. The area involved is another vital one in the democratic process,—the right of association for political expression and action. In this field, also, the power of legislative investigation to hamper, restrict and destroy can be overwhelming, especially where an unpopular political minority is under attack. Here also, we submit, regardless of how the line of First Amendment protection may be drawn, the Attorney General of New Hampshire has transgressed constitutional bounds.

The questions here at issue, it will be recalled, were whether Nancy Sweezy, appellant's wife, and Charles Beebe were active in forming the Progressive Citizens of America; whether appellant's meeting with Abraham Walenko in 1948 had anything to do with the Progressive Party; and whether Charles Beebe was active in the Progressive Party (see *supra*, pp. 13-4). In view of the application of most of our prior argument under Point II to these questions, we shall confine our discussion to a brief statement.

The most elemental principles of the democratic process, as embodied in the First and Fourteenth Amendments, require the government to keep its hands off the formation and operation of political organizations, except in certain narrow and specifically

defined areas. The state may, subject to pre-emptive Federal power, prevent the use of force or violence by political organizations and, we may assume, the advocacy of force or violence under conditions of clear and present danger. *Dennis* v. *U. S.*, 341 U. S. 494. It may also regulate political associations in certain respects not relevant here, such as with regard to election practices, direct lobbying, participation by government employees, and the like. But it may not interfere with the normal political process of forming or maintaining political organizations which advocate particular points of view or work for particular economic, social or political change by peaceful and legitimate methods. *DeJonge* v. *Oregon*, 299 U. S. 353; *U. S.* v. *Rumely*, 345 U. S. 41.

Yet this is exactly what the State of New Hampshire has attempted to do in this case through use of the legislative investigating power. So far as appears from this record, the Progressive Party and the Progressive Citizens of America were lawful political organizations (see R. 218). Appellant answered all questions with regard to his activities in these organizations and his knowledge of their activities, so far as the use or advocacy of force and violence was concerned. There is no evidence in the record or claimed to be in the possession of the Attorney General that either of them had ever employed force or violence or advocated its use. Appellant also answered all questions concerning the presence of Communist Party members in the two organizations and concerning Communist influence or manipulation of any kind. The remaining questions, to which the Attorney General now seeks an answer, thus related only to the peaceful and legitimate activities of political organizations not shown to have engaged in any illegal activity. And the persons the Attorney General inquired about — appellant's wife and two others — were not shown to be or claimed to be Communist Party members or "subversive persons." Hence the questions here at issue embraced an area plainly beyond the power of legislative action and equally beyond the scope of legislative inquiry. *Quinn* v. *U. S.*, 349 U. S. 155, 161; *U. S.* v. *Rumely*, 345 U. S. 41, 48.

Respondent has attempted to justify the inquiry into areas beyond the control of state legislative power upon the ground that the Attorney General was entitled to know what persons were active in the Progressive Party because he might have other information that such persons were Communist Party members or "subversive persons," and that the information sought would therefore have a bearing upon whether the Progressive Party was a "subversive organization." The argument, in effect, asserts a right to carry the legislative process of investigation, with all its sanctions, deep into every corner of a political party's activity, on the ground that some members of that party might also be members of the Communist Party. Moreover, as just stated, the Attorney General did not claim, and there was no showing, that the persons inquired about were Communist Party members or "subversive persons." Some of the questions related to the activities of the Progressive Citizens of America, which had gone out of existence in 1948, three years before enactment of the 1951 Act. Another question was not even directed to the issue whether the person involved (Abraham Walenko) was a member of the Progressive Party. Under the circumstances such a remote and speculative relation is not sufficient to overcome the clear mandate of the First Amendment that normal political activities must be free of government interference or restraint. Any other rule would, as noted previously, effectively open up virtually all political activity to the destructive impact of legislative investigation.

The same considerations dispose of respondent's argument that the questions were valid because information in the Attorney General's possession, though never produced in this proceeding, indicated that five or more leaders of the Progressive Party were also members of the Communist Party and that the Communist Party influenced the policies of the Progressive Party (R. 189-92). The New Hampshire Supreme Court held that these assertions of the Attorney General made the questions at issue here relevant under the New Hampshire statutes (R. 218-9). But the test of

statutory relevancy is not the same as the test of constitutional validity. Appellant answered all questions pertaining to Communist Party membership and influence. The further questions, opening up every phase of Progressive Party activity, were beyond the scope of legitimate inquiry.

Finally, respondent urges here again that the Attorney General was authorized to test appellant's answers through cross-examination embracing areas far beyond the range of "subversive activities." The answer given above is equally applicable here. On respondent's theory the Attorney General could call any member of an organization concerned with the field of public affairs; ask whether the organization contained any Communist members or was influenced by the Communist Party; and, if the answer is "No," proceed to conduct a full scale investigation into the affairs of the organization. To uphold such a view would subject all activities of numerous organizations—the Americans for Democratic Action, the American Civil Liberties Union, the National Association for the Advancement of Colored People, even the Democratic and Republican Parties—to investigation and exposure by legislative committees.

We must conclude, therefore, that the limiting principle of the First Amendment, as enunciated by this Court in the *Quinn* case, precludes the Attorney General from compelling an answer to the questions here at issue.

The same result would follow from the application of other theories of the First Amendment. The literal application of the First Amendment would plainly foreclose the issue. No clear and present (or probable) danger can arise from the legitimate activities of legitimate political organizations such as were here the subject of the Attorney General's inquiry. Any interest of the State of New Hampshire in probing the conduct of lawful political organizations is far overbalanced by the damage to the right of political association.

POINT IV

THE NEW HAMPSHIRE STATUTES COMPELLING APPELLANT TO ANSWER THE QUESTIONS HERE INVOLVED CONTRAVENE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The principal source of authority for the Attorney General's investigation is the provision of the 1953 resolution which authorizes him to investigate "whether subversive persons as defined in [the 1951] Act are presently located within this state" (N. H. Laws 1953, Ch. 307, App. A, *infra*, p. 71.)[20] Examination of the term "subversive person" in the 1951 Act at once reveals that the power conferred upon the Attorney General is stated in such vague and uncertain language that it is impossible to ascertain its meaning or to limit its scope to situations properly within state authority.

"Subversive person," as defined in the 1951 Act, includes "any person who commits, attempts to commit, or *aids* in the commission, or advocates, abets, *advises or teaches, by any means* any person to commit, attempt to commit, or *aid* in the commission of any act *intended* to overthrow, destroy or alter, or to *assist* in the overthrow, destruction or alteration of" the constitutional form of government by force or violence (Sec. 1; italics supplied). This definition, as pointed out above, has been interpreted by the New Hampshire Supreme Court to include persons engaged in the specified conduct "whether or not done 'knowingly and willfully'" (*Nelson* v. *Wyman*, 99 N. H. 33, 39).

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[20]The other source of authority for the investigation was the provision authorizing the Attorney General to investigate "with respect to violations of the subversive activities act of 1951." The Attorney General, as chief enforcement officer of the state, already had full power to make such investigations and presumably had done so.

The result is that a person engaging in political activities in New Hampshire finds it impossible to know when some action of his, not knowingly or willfully undertaken, will be construed to "aid" in the commission of an act "intended" to "assist" in the overthrow of the government by force or violence. Similarly, he would not know when a speech or pamphlet of his, without his knowing or willing it, may be held to "teach" a person to "aid" in the commission of an act "intended" to "assist" in the overthrow of the government. For example, an individual might be subjected to questioning as a "subversive person," as the Attorney General argued in the Superior Court, if he said in a speech that socialism is inevitable in the United States:

> "If he made the statement to them that that kind of Socialism is inevitable in America, that is not teaching; as a matter of actual fact, that is advocacy, because to say something is inevitable is not to present it objectively at all but is to implant within youth the idea that the social system which exists in a Communist country is inevitable in America." (R. 147).

Similarly the Attorney General argued, with respect to another witness called by him:

> "Doesn't the question of whether or not a professor at a state institution who knew that a student chose Communism would not attempt to dissuade him in that choice any more than if he chose Capitalism, doesn't that question strike a relevant cord in an investigation into subversion?" (R. 118).

The term "subversive person" also includes any person "who is a member of a subversive organization or a foreign subversive organization" (Sec. 1). A "subversive organization" is defined to include any organization which advocates, abets, advises or teaches activities intended to overthrow, or to *assist* in the overthrow, of government by force or violence (Sec. 1). And a "foreign subversive organization" includes one "directed, dominated or controlled *directly or indirectly* by a foreign government"

which teaches, even by peaceful and constitutional methods, the "alteration of the constitutional form of government" and the establishment of "any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization, or individual" (Sec. 1, italics supplied). Again the New Hampshire Supreme Court has interpreted the term "subversive person" to mean persons who were members of subversive and foreign subversive organizations "not knowing them to be such" (*Nelson* v. *Wyman*, 99 N. H. at 37; see also opinion in this case, R. 214, 216, 218).

Hence the right to join or participate in the affairs of political associations in New Hampshire is subjected to serious hazards. Any organization which later turns out to have one or more members suspected of being "subversive persons," or to be cited by the House Committee on Un-American Activities, might be held liable to investigation as "subversive." Thereupon the activities of all members, entirely apart from their actual knowledge of the situation, would be open to scrutiny and exposure by the Attorney General. Under such circumstances an individual considering participation in a political group, other than a rigidly orthodox one, would never know but that his wholly innocent and well-intended interest in public affairs might result in his being officially labelled a "subversive person."

The further power of the Attorney General to conduct investigation into violations of the 1951 Act, while in some respects more limited, is subject to similar uncertainty. Thus it is a felony to "assist in the formation or participate in the management or to contribute to the support of any subversive organization or foreign subversive organization" (Sec. 2 (d)). It is true that these provisions include requirements of knowledge and willfulness. Cf. *Dennis* v. *U. S.*, 341 U. S. 494, 515-6. But in a legislative investigatory proceeding such limitations would offer no

protection. For the public process of investigation, and its impact on the individual and the community, would be completed before the lack of knowledge or willfulness could be established.

The Attorney General did not distinguish between the two sources of his power in conducting the investigation. As already noted his principal reliance must have been upon the power to search for "subversive persons." In any event the vagueness inherent in that term and in some of the felony provisions so permeated the whole investigation that the existence of certain more definite provisions would be of little help in resolving the uncertainties of the witness.

The extent to which this uncertainty characterized the investigation is clear from the range of questions addressed to appellant by the Attorney General and his staff assistant, Mr. Conner. Among them were:

> Mr. WYMAN. Have you advocated and taken action designed to aid the replacement of the free enterprise economic system of the United States with some other form? (R. 39).

> Mr. WYMAN. Do you advocate now, today, that the Government of the United States or of the various states inquire into alleged subversion in this country purposing to establish either a Nazi or Fascist dictatorship in this country? (R. 46).

> Mr. CONNER. In the "Monthy Review" have you yourself taken the position that the only kind of a settlement which would really solve the German problem would be unification of the Country coupled with the kind of structural reforms which have been already instituted in the Soviet Zone? (R. 55).

Attorney General WYMAN. Did you carry physically into the lecture hall or room, as the case may be, anything in the nature of printed materials in assistance of your lecture?

The WITNESS. I had my brief case with me.

Attorney General WYMAN. Do you have any memory of what was in that brief case in connection with printed materials? (R. 72).

Attorney General WYMAN. In what respects is the dialectically materialistic aspect of the evolution of society consistent with belief in God? (R. 105).

Attorney General WYMAN. And in this Socialist economy that you advocate, that you support, who would own the means of production? (R. 108).

The same uncertainty as to whether there is any stopping place in the search for "subversive persons" appears throughout the Attorney General's petition and argument to the Superior Court (see *e.g.*, R. 10, 121, 125, 133, 148). And it is perhaps not without significance that in the view of Mr. Conner, the Attorney General's assistant, the scope of the investigation included taking down the license plate numbers of persons attending the Superior Court session (R. 199-200).

The uncertainty thus inherent in the New Hampshire statutes plainly fails to meet the requirements of due process that legislation must be framed in sufficiently clear terms to permit those subject to it to know "where this new standard of guilt would draw the line between the allowable and the forbidden . . ." *Winters* v. *N. Y.*, 333 U. S. 507, 519; *Lanzetta* v. *N. J.*, 306 U. S. 451; *Musser* v. *Utah*, 333 U. S. 95; *Connally* v. *General Construction Co.*, 296 U. S. 385. We are not dealing here with a traditional criminal prosecution. But the sanctions of the investigatory process can be equally severe. And the rule against

vagueness applies even to legislation enforced by civil process. *A. B. Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233.

The rule against vagueness has special force where the uncertainty pertains to the right of political expression. This is true because uncertainty in this area operates as a prior restraint upon communication, the most noxious form of restriction upon speech. See *Near* v. *Minnesota*, 283 U. S. 697; *Burstyn* v. *Wilson*, 343 U. S. 495; *Thornhill* v. *Alabama*, 310 U. S. 88, 97-8. Likewise it creates the opportunity for discriminatory application of the law, a factor which weighs heavily against speech that is unpopular. See *Thornhill* v. *Alabama*, *supra*; *Kunz* v. *N. Y.*, 340 U. S. 290, 293-4; *Niemotko* v. *Maryland*, 340 U. S. 268, 271-3.

One other aspect of due process is likewise decisive. The breadth of the statute (and the investigation under it) carries its restrictions into areas that due process of law does not permit to a state. This Court has expressly ruled that a state requirement for loyalty of government employees, which imposes disqualification for innocent membership in subversive organizations, violates due process of law. *Wieman* v. *Updegraff*, 344 U. S. 183. The legislation here involved has been interpreted by the New Hampshire Supreme Court to do precisely what this Court outlawed in the *Updegraff* case. The fact that this legislation imposes sanctions through legislative investigation rather than through deprivation of government employment, does not change the principle. In fact, the arbitrary exercise of the power of legislative inquiry may be even more destructive of individual rights than a similar exercise of power over eligibility for government employment. In either case, "Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power" (344 U. S. at 191).

POINT V

THE NEW HAMPSHIRE STATUTES ARE INVALID BY REASON OF FEDERAL PRE-EMPTION OF THE FIELD.

In *Pennsylvania* v. *Nelson*, 350 U. S. 497, this Court held the Pennsylvania Sedition Act invalid on the ground that existing Federal legislation in the field of sedition precluded state legislation on the same subject. That decision is controlling here.

(1)

The power of the Attorney General of New Hampshire to conduct a legislative investigation under the 1953 resolution (N. H. Laws 1953, Ch. 307, App. A *infra*, p. 71) clearly depended upon the validity of the Subversive Activities Act of 1951 (N. H. Laws 1951, Ch. 193, App. A *infra*, p. 62). The Attorney General's authority under the enabling resolution was limited to an "investigation with respect to violations of the subversive activities act of 1951 and to determine whether subversive persons as defined in said act are presently located within this state." Obviously authority to investigate violations of the 1951 Act must have meant activities that could constitutionally be made a violation of that Act. Similarly authority to investigate "subversive persons" as defined in the 1951 Act must have meant persons who could be constitutionally so designated for purposes of state control.

The Supreme Court of New Hampshire has recognized this dependence of the 1953 resolution upon the 1951 Act. In *Nelson* v. *Wyman*—a proceeding which directly challenged only the Attorney General's investigation—the Court assumed throughout that the investigation would be valid only if the 1951 Act was valid, and proceeded to examine and pass upon the validity of the 1951 Act. See 99 N. H. 33, 41-2, 46-51.

Under the *Pennsylvania v. Nelson* ruling those provisions of the 1951 Act which deal with sedition (Sec. 2 to 8, incl.) are clearly superseded by the Federal legislation on the same subject; they deal with the same matters, and in the same way, as did the Pennsylvania Sedition Act. Those provisions of the 1951 Act which established a loyalty program for state employees and candidates for state office (Sec. 9 to 14, incl.) are presumably unaffected by the *Nelson* case.[21] Since the 1953 resolution is valid only to the extent that the 1951 Act is valid, the only remaining issue is whether the questions which appellant refused to answer were premised upon power derived from the valid or invalid portions of the 1951 statute.

The answer to this would not seem in doubt. None of the questions propounded to appellant related to the loyalty program for state employees or candidates for state office. All concerned issues of alleged sedition aimed at the entire nation, of the same nature as those involved in the Pennsylvania case. These provisions of the 1951 statute being invalid under the *Nelson* decision, the investigation is likewise beyond state power.

(2)

The same result follows whether or not it be held that the validity of the 1953 resolution depends upon the validity of the 1951 Act. Even if the 1953 resolution be construed as an independent delegation of authority to investigate subversive acts and persons, without reference to the 1951 Act, any such attempted exercise of state power to investigate must fail under the *Nelson* doctrine.

The purpose of the 1953 resolution was clearly to conduct an investigation into the type of "subversive activities" which, it is

[21] The remaining sections—Sec. 1, 15, 16 and 17—are applicable to both halves of the Act.

now plain, are subject to exclusive Federal control. The objective of the Attorney General was the same. And the investigation actually conducted in this case, as just observed, in fact dealt with such matters and only such matters. Whatever authority the State of New Hampshire may have to inquire into "subversive activities" affecting only State interests, no such power was exercised here.

Clearly a state legislative investigation, dealing entirely with matters pre-empted by Federal authority, must be invalid. The source of authority to investigate is the power to obtain information in aid of legislation. The New Hampshire Supreme Court made this entirely clear in *Nelson* v. *Wyman*:

> "It is of little importance that the resolution in this case fails to state in explicit terms the use to which the Legislature intends to put the information gained by it from the investigation since it plainly relates to a subject matter into which the legislature has authority to inquire. *McGrain* v. *Daugherty*, 273 U. S. 135, 178; *In re Chapman*, 166 U. S. 661, 670. It specifically directs the Attorney General to report to the Legislature the results of this investigation and his recommendations as to any necessary legislation, thus indicating with sufficient clarity a legislative purpose that a subject matter properly within its jurisdiction be investigated with a view of providing it with information upon which further action by it may be predicated." *Nelson* v. *Wyman*, 99 N. H. 33, 36-7; to the same effect see opinion in this case (R. 211).

Since *Pennsylvania* v. *Nelson* precludes state legislation in this field the power to investigate does not exist. If the primary function of legislating is not open to the New Hampshire legislature the dependent power to investigate is a fortiori foreclosed.

On the other hand, if we assume, contrary to the expressed views of the New Hampshire Supreme Court, that the New Hampshire legislature has power to investigate for purposes other

than as an aid to legislation, the investigating resolution is equally invalid under *Pennsylvania* v. *Nelson*. In that event the purpose of the investigation would be in the nature of regulation, such as to apply the sanctions of publicity or exposure to "subversive activities" or "subversive persons." Such regulation is plainly precluded for the same reasons as the Pennsylvania Sedition Act. It deals with an area where the scheme of Federal regulation is now pervasive; it touches a field in which the Federal interest is dominant; and it entails serious danger of conflict with Federal regulation and investigation. *Pennsylvania* v. *Nelson*, 350 U. S. at 502-10.

CONCLUSION

The issues here go to the heart of the democratic process in America. At no time in our history has it been more important to keep open the channels of public discussion concerning the vital and troublesome questions which face the people of our nation in these difficult times. The power of legislative inquiry has been used here to block public discussion at two crucial points—in the academic community where new ideas and plans must be generated and developed, and in the arena of political organization where policy decisions must be formulated and carried into action. No legitimate interest of the state justifies the suppression of free expression such as was attempted in this case.

We respectfully submit that the decision of the New Hampshire Supreme Court should be reversed with instructions to dismiss the proceedings.

Respectfully submitted,

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January 1957

APPENDIX A

LAWS OF NEW HAMPSHIRE 1951

CHAPTER 193

AN ACT RELATIVE TO SUBVERSIVE ACTIVITIES

WHEREAS, there is a World-Communist movement under the domination of a foreign power, having as its objective the establishment of totalitarian dictatorship in all parts of the world under its control; and

WHEREAS, such dictatorship is characterized by the liquidation of all political parties other than the Communist Party, the abolishment of free speech, free assembly, and freedom of religion, and is the complete antithesis of the American constitutional form of government; and

WHEREAS, the methods used by such a police state include treachery, deceit, infiltration into governmental and other institutions, espionage, sabotage, terrorism and other unlawful means; and

WHEREAS, the World Communist movement is not a political movement, but is a world-wide conspiracy having sections in each country; and

WHEREAS, using the methods above set forth, it has already successfully conquered in recent years a large part of the world and has established spearheads in this country in the form of various conspiratorial organizations, some masquerading under the pretense of being political parties, others infiltrating organizations which they seek to control in order to further the objectives of the World Communist movement; and

WHEREAS, the subversive groups have had similar objectives and it is essential to the preservation of the state, as well as for the protection of citizens from unfounded accusations, that criminal acts of a seditious nature be clearly and expressly defined; and

WHEREAS, the methods adopted by subversive persons and organizations render it imperative that the loyalty of persons entering the public employment of the state of New Hampshire or any of its political subdivisions be definitely established, not only for protection of governmental processes but in order to shield employees from unfounded accusations of disloyalty; therefore

Be it enacted by the Senate and House of Representatives in General Court convened:

1: **Subversive Activities.** Amend the Revised Laws by adding after chapter 457 the following new chapter:

Chapter 457-A

Subversive Activities

1. **Definitions.** For the purposes of this chapter "organization" means an organization, corporation, company, partnership, association, trust, foundation, fund, club, society, committee, association, political party, or any group of persons, whether or not incorporated, permanently or temporarily associated together for joint action or advancement of views on any subject or subjects.

"Subversive organization" means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of New Hampshire, or of any political subdivision of either of them, by force, or violence.

"Foreign subversive organization" means any organization directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate,

abet, advise, or teach, activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of government of, the United States, or of the state of New Hampshire, or of any political subdivision of either of them, and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization, or individual; but does not and shall not be construed to mean an organization the *bona fide* purpose of which is to promote world peace by alliances or unions with other governments or world federations, unions or governments to be effected through constitutional means.

"Foreign government" means the government of any country or nation other than the government of the United States of America or of one of the states thereof.

"Subversive person" means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches, by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of New Hampshire, or any political subdivision of either of them, by force, or violence; or who is a member of a subversive organization or a foreign subversive organization.

Sedition

2. **Felonies.** It shall be a felony for any person knowingly and willfully to

(a) commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of New Hampshire, or any political subdivision of either of them, by force or violence; or

(b) advocate, abet, advise, or teach by any means any person to commit, attempt to commit, or assist in the commission of any such act under such circumstances as to constitute a clear and present danger to the security of the United States, or of the state of New Hampshire or of any political subdivision of either of them; or

(c) conspire with one or more persons to commit any such act; or

(d) assist in the formation or participate in the management or to contribute to the support of any subversive organization or foreign subversive organization knowing said organization to be a subversive organization or a foreign subversive organization; or

(e) destroy any books, records or files, or secrete any funds in this state of a subversive organization or a foreign subversive organization, knowing said organization to be such.

Any person who shall be convicted by a court of competent jurisdiction of violating any of the provisions of this section shall be fined not more than twenty thousand dollars, or imprisoned for not more than twenty years, or both, at the discretion of the court.

3. **Penalty.** It shall be a felony for any person after August 1, 1951 to become, or after November 1, 1951 to remain a member of a subversive organization or a foreign subversive organization knowing said organization to be a subversive organization or foreign subversive organization. Any person who shall be convicted by a court of competent jurisdiction of violating this section shall be fined not more than five thousand dollars; or imprisoned for not more than five years, or both, at the discretion of the court.

4. **Barred from Office.** Any person who shall be convicted by a court of competent jurisdiction of violating any of the provisions of sections 2 and 3 of this chapter, in addition to all other penalties therein provided, shall from the date of such conviction be barred from

(a) holding any office, elective or appointive, or any other position of profit or trust in or employment by the government

of the state of New Hampshire or any agency thereof or of any county, municipal corporation or other political subdivision of said state;

(b) filing or standing for election to any public office in the state of New Hampshire.

5. **Dissolution of Organizations.** It shall be unlawful for any subversive organization or foreign subversive organization to exist or function in the state of New Hampshire and any organization which by a court of competent jurisdiction is found to have violated the provisions of this section shall be dissolved, and if it be a corporation organized and existing under the laws of the state of New Hampshire, a finding by a court of competent jurisdiction that it has violated the provisions of this section shall constitute legal cause for forfeiture of its charter and its charter shall be forfeited, and all funds, books, records and files of every kind and all other property of any organization found to have violated the provisions of this section shall be seized by and for the state of New Hampshire, the funds to be deposited in the state treasury and the books, records, files and other property to be turned over to the attorney general of New Hampshire.

6. **Assistance Furnished.** For the collection of any evidence and information referred to in this chapter, the attorney general is hereby directed to call upon the superintendent of state police, and county and municipal police authorities of the state to furnish him such assistance as may from time to time be required. Such police authorities are directed to furnish information and assistance as may be from time to time so requested. The attorney general may testify before any grand jury as to matters referred to in this chapter as to which he may have information.

7. **Records.** The attorney general shall maintain complete records of all information received by him and all matters handled by him under the requirements of this chapter. Such records as may reflect on the loyalty of any resident of this state shall not be made public nor divulged to any person except with the permissions of the attorney general to effectuate the purposes hereof.

8. **Grand Jury Inquiries.** The superior court, when in its discretion it appears appropriate or when informed by the county solicitor that there is information or evidence of the character described in section 2 of this chapter to be considered by the grand jury, shall charge the grand jury to inquire into violations of this chapter for the purpose of proper action, and further to inquire generally into the purposes, processes and activities and any other matters affecting communism or any related or other subversive organizations, associations, groups or persons.

Loyalty

9. **Employment.** No subversive person, as defined in this chapter, shall be eligible for employment in, or appointment to any office, or any position of trust or profit in the government of, or in the administration of the business of this state, or of any county, municipality, or other political subdivision of this state.

10. **Written Statements Required.** Every person and every board, commission, council, department, court or other agency of the state of New Hampshire or any political subdivision thereof, who or which appoints or employs or supervises in any manner the appointment or employment of public officials or employees shall establish by rules, regulations or otherwise, procedures designed to ascertain before any person, including teachers and other employees of any public educational institution in this state, is appointed or employed, that he or she as the case may be, is not a subversive person, and that there are no reasonable grounds to believe such persons are subversive persons. In the event such reasonable grounds exist, he or she as the case may be, shall not be appointed or employed. In securing any facts necessary to ascertain the information herein required, the applicant shall be required to sign a written statement containing answers to such inquiries as may be material, which statement shall contain notice that it is subject to the penalties of perjury.

11. **Exceptions.** The inquiries prescribed in section 10 other than the written statement to be executed by an applicant for

employment, shall not be required as a prerequisite to the employment of any persons in the classification of laborers in any case in which the employing authority shall in his or its discretion determine, and by rule and regulation specify the reasons why, the nature of the work to be performed is such that employment of persons as to whom there may be reasonable grounds to believe that they are subversive persons as defined in this chapter will not be dangerous to the health of the citizens or the security of the government of the United States, the state of New Hampshire or any political subdivision thereof.

12. **Present Employees.** Every person, who on August 1, 1951 shall be in the employ of the state of New Hampshire or of any political subdivision thereof, other than those now holding elective office shall be required on or before October 1, 1951 to make a written statement which shall contain notice that it is subject to the penalties of perjury, that he or she is not a subversive person as defined in this chapter, namely, any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of New Hampshire, or any political subdivision of either of them, by force, or violence; or who is a member of a subversive organization or a foreign subversive organization, as more fully defined in this chapter such statement shall be prepared and execution required by every person and every board, commission, council, department, court, or other agency of the state of New Hampshire or any political subdivision thereof responsible for the supervision of employees under its jurisdiction. Any such person failing or refusing to execute such a statement or who admits he is a subversive person as defined in this chapter shall immediately be discharged.

13. **Discharge of Personnel; Hearing.** Reasonable grounds on all the evidence to believe that any person is a subversive person, as defined in this chapter shall be cause for discharge from any

appointive office or other position of profit or trust in the government of or in the administration of the business of this state, or of any county, municipality or other political subdivision of this state, or any agency thereof. The personnel commission shall, by appropriate rules or regulations, prescribe that persons charged with being subversive persons, as defined in this chapter, shall be accorded notice and opportunity to be heard, in accordance with the procedures prescribed by law for discharges for other reasons. Every person and every board, commission, council, department, or other agency of the state of New Hampshire or any political subdivision thereof having responsibility for the appointment, employment or supervision of public employees not covered by the state classified service shall establish rules or procedures similar to those required herein for classified services for a hearing for any person charged with being a subversive person, as defined in this chapter after notice and opportunity to be heard. Every employing authority discharging any person pursuant to any provision of this chapter shall promptly report to the attorney general the fact of and the circumstances surrounding such discharge. A person discharged under the provisions of this section shall have the right within thirty days thereafter to appeal to the superior court of the county where such person may reside for a determination by such court (with the aid of a jury if the appellant so elects) as to whether or not the discharge appealed from was justified under the provisions of this act. The court shall speedily hear and determine such appeals, and from the judgment of the court, there shall be a further appeal to the supreme court of New Hampshire as in civil cases.

14. Declarations of Candidates. No person shall become a candidate for election to, nor qualify for, any public office under the election laws of this state unless he or she shall file with the declaration of candidacy, or prior to qualifying, an affidavit that he or she is not a subversive person as defined in this chapter. No declaration of candidacy shall be received for filing by any town or city clerk or by the secretary of state unless accompanied by the affidavit aforesaid and there shall not be entered upon any

ballot or voting machine at any election the name of the person who has failed or refused to make the affidavit aforesaid. (As amended by N. H. Laws 1953, Ch. 180).

15. **False Statements.** Every written statement made pursuant to this chapter by an applicant for appointment or employment, or by any employee shall be deemed to have been made under oath if it contains a declaration preceding the signature of the maker to the effect that it is made under the penalties of perjury. Any person who makes a material misstatement of fact (a) in any such written statement, or (b) in any affidavit made pursuant to the provisions of this chapter, or (c) under oath in any hearing conducted by any agency of the state, or of any of its political subdivisions, pursuant to this chapter, or (d) in any written statement by an applicant for appointment or employment or by an employee in any state aid institution of learning in this state, intended to determine whether or not such applicant or employee is a subversive person as defined in this chapter, which statement contains notice that it is subject to the penalties of perjury shall be subject to the penalties of perjury prescribed in chapter 457 of the Revised Laws.

16. **Separability.** If any provision, phrase, or clause of this chapter or the application thereof to any person or circumstance is held invalid, such invalidity shall not effect other provisions, phrases, or clauses or applications of this chapter which can be given effect without the invalid provision, phrase, or clause or application and to this end the provisions, phrases and clauses of this chapter are declared to be severable.

17. **Title.** This chapter may be cited as the Subversive Activities Act of 1951.

This act shall take effect August 1, 1951.

(Approved August 1, 1951.)

LAWS OF NEW HAMPSHIRE 1953

CHAPTER 307

Joint Resolution Relating to the Investigation of Subversive Activities

Resolved by the Senate and House of Representatives in General Court convened:

That the attorney general is hereby authorized and directed to make full and complete investigation with respect to violations of the subversive activities act of 1951 and to determine whether subversive persons as defined in said act are presently located within this state. The attorney general is authorized to act upon his own motion and upon such information as in his judgment may be reasonable or reliable. He may authorize any member of his staff to conduct on his behalf any part of the investigation herein provided for and in such event and for such purposes any member so authorized shall have all the powers herein granted to the attorney general.

For the purposes of this resolution, the attorney general or any duly authorized member of his staff is authorized to sit and act at such times and places during this session of the 1953 legislature, recess and adjourned periods, and to employ such attorneys, experts, clerical and other assistance as may be required, to require by subpoena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents, and to administer such oaths, to take such testimony and to make such expenditures within the limitations authorized herein as he deems advisable. The provisions of section 7 of chapter 193 of the Laws of 1951 shall be inapplicable to the investigation provided for herein, and the attorney general is hereby authorized to make public such information received by him, testimony given before him, and matters handled by him as he deems fit to effectuate the purposes of this resolution.

The attorney general is directed to proceed with criminal prosecutions under the subversive activities act whenever evidence presented to him in the course of the investigation indicates violations thereof, and he shall report to the 1955 session on the first day of its regular session the results of this investigation, together with his recommendations, if any, for necessary legislation. There is hereby appropriated for the expenses of this investigation the sum of ten thousand dollars which shall include the cost of printing such report as is provided for by this resolution and shall be expended under the direction of the attorney general, but nothing herein contained shall limit the power of the attorney general to act in cases of reasonable necessity under the provisions of section 11 of chapter 24 of the Revised Laws. The governor is hereby authorized to draw his warrants for the sum hereby appropriated out of any money in the treasury not otherwise appropriated.

[Approved June 17, 1953.]

LAWS OF NEW HAMPSHIRE 1955

CHAPTER 181

An Act Relative to Evidence of Membership or Participation in Subversive Organizations

Be it enacted by the Senate and House of Representatives in General Court convened:

1. Membership or Participation in Subversive Organizations.

Amend chapter 457-A of the Revised Laws, as inserted by chapter 193, Laws of 1951 (section 3, chapter 588, RSA) by inserting after section 3 the following new sections:

3-a. Evidence of Membership or Participation. In determining membership or participation in a subversive organization or a foreign subversive organization as defined in this chapter,

or knowledge of the purpose or objective of such organization, the jury, under instructions from the court, may consider evidence, if presented, as to whether the accused person to his knowledge:

(1) has been listed as a member in any book or any of the lists, records, correspondence, or any other document of the organization;

(2) Has made financial contribution to the organization in dues, assessments, loans, or in any other form;

(3) Has made himself subject to the discipline of the organization in any form whatsoever;

(4) Has executed orders, plans, or directives of any kind of the organization;

(5) Has acted as an agent, courier, messenger, correspondent, organizer, or in any other capacity in behalf of the organization;

(6) Has conferred with officers or other members of the organization in behalf of any plan or enterprise of the organization;

(7) Has been accepted as an officer or member of the organization or as one to be called upon for services by other officers or members of the organization;

(8) Has written, spoken or in any other way communicated by signal, semaphore, sign, or in any other form of communication orders, directives, or plan of the organization;

(9) Has prepared documents, pamphlets, leaflets, books, or any other type of publication in behalf of the objectives and purposes of the organization;

(10) Has mailed, shipped, circulated, distributed, delivered, or in any other way sent or delivered to others material or propaganda of any kind in behalf of the organization;

(11) Has advised, counseled or in any other way imparted information, suggestions, recommendations to officers or members

of the organization or to anyone else in behalf of the objectives of the organization;

(12) Has indicated by word, action, conduct, writing or in any other way a willingness to carry out in any manner and to any degree the plans, designs, objectives, or purposes of the organization;

(13) Has in any other way participated in the activities, planning, actions, objectives, or purposes of the organization;

(14) The enumeration of the above subjects of evidence on membership or participation in a subversive organization or a foreign subversive organization as above defined, shall not limit the inquiry into and consideration of any other subject of evidence on membership and participation as herein stated.

3-b. **Construction.** Nothing in section 3-a shall be construed to limit the supervisory power of the court over the admission and exclusion of evidence or over the sufficiency of the evidence as a whole.

2. **Takes Effect.** This act shall take effect upon its passage.

[Approved June 8, 1955.]

LAWS OF NEW HAMPSHIRE 1955

CHAPTER 197

An Act Relative to Investigation of Subversive Activities

Be it enacted by the Senate and House of Representatives in General Court convened:

1. **Subversive Investigation.** The investigation of subversive activities by the attorney general provided for by chapter 307 of the laws of 1953, as continued by a resolution approved January 13, 1955, is hereby continued in full force and effect, in form, manner and authority as therein provided for the further

period until June 30, 1957. The attorney general shall report to the general court of 1957 the results of this further investigation together with his recommendations, if any, for necessary legislation. He may at any time during said period temporarily or permanently conclude his investigation hereunder if, in his opinion, no useful public purpose would be served by continuation of the investigation. There is hereby appropriated for the expenses of this continued investigation a sum not to exceed forty-two thousand five hundred dollars, which shall include the cost of printing such report as is provided for hereby, but nothing herein contained shall limit the power of the attorney general to act in cases of reasonable necessity under the provisions of section 11 of chapter 24 of the Revised Laws (section 12, chapter 7, RSA). The governor is hereby authorized to draw his warrants for the sum hereby appropriated out of any money in the treasury not otherwise appropriated.

2. **Takes Effect.** This act shall take effect upon its passage.

[Approved June 14, 1955.]

LAWS OF NEW HAMPSHIRE 1955

CHAPTER 340

Joint Resolution Relative to Continued Duties of the Attorney General

Resolved by the Senate and House of Representatives in General Court convened:

THAT the attorney general is hereby authorized and directed to continue the investigation authorized by chapter 307 of the Laws of 1953 in form, manner and authority as therein provided for the period from January 1, 1955 to April 30, 1955, and for the purposes hereof the provisions of said chapter 307, except as otherwise herein provided, are hereby continued in full force and effect for the additional period herein mentioned.

[Approved January 13, 1955.]

APPENDIX B

Merrimack.
No. 4509.

GORDON KAHN

v.

LOUIS C. WYMAN, *Attorney General*

Submitted May 31, 1956

Decided June 8, 1956

PETITION, for declaratory judgment and injunctive relief seeking a declaration that RSA 588 and Laws 1953, *c.* 307 and Laws 1955, *c.* 197 are superseded and of no effect. The plaintiff has been ordered by the defendant to appear before him in his investigation of subversive activities. The present proceedings seek to halt this investigation on the grounds that the field of prosecution and investigation of subversive activities is now exclusively occupied by the federal authorities. After hearing, the Superior Court denied the petition and the defendant's exceptions were reserved and transferred by *Westcott, J.*

Tiffany & Osborne for the plaintiff.

Louis C. Wyman, Attorney General, *pro se.*

Hugh H. Bownes, amicus curiae.

PER CURIAM. The divided opinion in *Pennsylvania v. Nelson*, 350 U. S. 497 (decided April 2, 1956) is interpreted to hold that this state is precluded from prosecuting crimes which involve sedition and subversive activities directed against the government of the United States because as there stated the enforcement of state acts forbidding such activities "presents a serious danger of conflict with the administration of the federal program." See also, *Commonwealth v. Gilbert*, (Mass.) 134 N. E. (2d) 13 (decided May 3, 1956).

In the present case, however, the issue is whether or not the *Nelson* case precludes the Legislature of this state from conducting investigations of subversive activities within the state as distinct from providing for the prosecution of crimes. While it is not clear what a state legislative investigation of subversive activities may accomplish at the present time, we are not satisfied that the *Nelson* case, *supra*, purports to preclude such an investigation. If state investigation of subversive activities is to be prohibited, a declaration to that effect must come from higher authority than this court. We know of no decision of any court which has ruled that the investigative aspects of state subversive activities legislation have been preempted by the federal government. We therefore conclude that the Trial Court was correct in dismissing this petition.

Questions attempted to be raised about the validity of the Immunity Act (Laws 1955, c. 312) are not involved in this proceeding at this time.

Petition dismissed.

APPENDIX C

STATE OF NEW HAMPSHIRE

SUPREME COURT

CERTIFICATE

This is to certify that the Supreme Court of the State of New Hampshire considered upon its merits the further motion for rehearing filed on behalf of the defendant Paul M. Sweezy in the action entitled, *No. 5395, Louis C. Wyman, Attorney General* v. *Paul M. Sweezy*. This motion raised the question of supersession of RSA Chapter 588 and Chapter 307, Laws of 1953 by federal occupation of the field to the exclusion of parallel state legislation after *Commonwealth of Pennsylvania* v. *Steve Nelson*, 350 U.S. 497 (1956) was decided. After due consideration, the Court unanimously denied the further motion for rehearing because it is not satisfied that the *Nelson* case, *supra*, purports to preclude a state legislative investigation of subversive activities. See, *Gordon Kahn* v. *Louis C. Wyman, Attorney General*, decided June 8, 1956, 100 N. H.

IN WITNESS WHEREOF, the Supreme Court of the State of New Hampshire has affixed its hand and seal by its Chief Justice Frank R. Kenison.

(s) FRANK R. KENISON,
For the entire Court.
[SEAL]

January 9, 1957.

Motion to Dismiss

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JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM 1956

No. 175

PAUL M. SWEEZY

v.

THE STATE OF NEW HAMPSHIRE

On Appeal from The Supreme Court of The State of New Hampshire

MOTION TO DISMISS

THE STATE OF NEW HAMPSHIRE

BY: LOUIS C. WYMAN, Attorney General

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1956

No. 175

PAUL M. SWEEZY

v.

THE STATE OF NEW HAMPSHIRE

On Appeal from The Supreme Court of The State of New Hampshire

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MOTION TO DISMISS

THE STATE OF NEW HAMPSHIRE

BY: LOUIS C. WYMAN, Attorney General

PRELIMINARY STATEMENT

Appellee, The State of New Hampshire, by Louis C. Wyman, Attorney General, in conformity with Rule 16 of the Rules of this Honorable Court, respectfully submits the following Motion to Dismiss the appeal of Paul M. Sweezy, Appellant, on the grounds specified in said Motion.

MOTION TO DISMISS

I. No substantial Federal question is involved.

Now comes Appellee, The State of New Hampshire, by Louis C. Wyman, Attorney General, and respectfully moves that the appeal of Paul M. Sweezy, Appellant, as more particularly described in the Jurisdictional Statement filed by Appellant with this Honorable Court in June 15, 1956, be dismissed, on the ground that no substantial federal question is involved.

It is believed important to observe at this point that the decision of the New Hampshire Supreme Court appealed from involved a conviction of contempt of court in The State of New Hampshire for refusing to answer questions in a legislative fact-finding investigation. *It did not involve a prosecution for crime.* In affirming the conviction of contempt, the highest Court of the State found the questions to be relevant to the investigation and the answers to be required in the exercise of the fact-finding function of the delegated legislative committee.

Appellant was questioned concerning the content of lectures to students *required to attend the lectures to obtain academic credit* in a state-supported institution (the University of New Hampshire). His lectures were neither soap box addresses on the public common nor pre-publicized voluntary talks to an audience free to attend or not to attend, as it wished. Appellant declined to answer questions concerning the subject of his lecture or its content. In fact he would say nothing further than that he did not advocate therein the overthrow of constitutional government by force and violence. He refused to accede to reasonable, relevant, and courteous cross-examination to test his empirical denial of subversive activity without claiming the privilege against self-incrimination. For this he was found in contempt of court.

No federal question of substance is presented in the decision of a State Supreme Court requiring that a witness in a legislative fact-finding investigation answer questions the Court found to be relevant to an investigation to determine whether or not subversive activities as defined in a clear and well written statute (RSA

NH 588, as set forth in Appendix B to Appellant's Jurisdictional Statement) had taken place within the State. It is believed extremely important to stress the fact that upon the record before this Honorable Court, Appellant Sweezy was not a defendant before the delegated legislative questioner. He was a witness. He only became a defendant when the matter had been transferred to the Superior Court and when, on his own choice and with advice of his own counsel, in the presence of the Superior Court, he declined to answer questions found by that Court to be relevant to New Hampshire's investigation.

See: *Orman* v. *United States*, 207 F (2d) 148, 153 (1953)
Sinclair v. *United States*, 279 U.S. 263, 299 (1929)
Oklahoma Press Publishing Co. v. *Walling*, 327 U.S. 186, 209 (1946)

The difference between advocacy of subversive doctrine and teaching about what such doctrine is in the sense of objective explanation is obvious, at least on paper. Subtleties of shading of advocacy by inflection, gesture, or even mien, are not so obvious. It is unlawful to advocate subversive doctrine in New Hampshire. It is unlawful to advocate communism in New Hampshire. It is unlawful to advocate anything synonymous with communism no matter by what name it may be called if tenets, objectives and elements of the subject include resort to force and violence to alter our constitutional government if need be.

The Supreme Court of New Hampshire has held as a matter of law that in New Hampshire a legislative fact-finding committee inquiring into subversive activity—charged with the responsibility of finding out whether subversive activity has in fact existed in New Hampshire—may inquire into the actual content of any lecture given at any school. *Nelson* v. *Wyman*, 99 N. H. 33, 105 A 2d 756 (1954). This ruling is crystal clear. It in no way operates as license to any legislative committee, or to the Attorney General acting as such, to subordinate objective classroom teachings to legislative fiat. It does not smack of fascism. It does not substitute a legislative committee for the board of

trustees of the institution. It confines the inquiry to the sole objective of determining whether there is or has been subversion in the statutory formula. It does permit inquiry within the precept of the investigating resolution. *When a witness says that there was no subversive conduct there then must follow questioning as to what was in fact done and in fact said.* Such questioning is not necessarily even criticism. It is merely fact-finding, no more and no less.

See: *U. S. News & World Report* issue of Oct. 21, 1955, "A New clue to Red Thinking, It's Still Toe the Mark or Else" pp. 37-41; 138;

The Theory and Practice of Communism, Hunt (MacMillan Co., N. Y. 1952), particularly c. 16, p. 64, "The Marxist Theory of the State and Revolution"

II. Relevant, courteous questioning to determine what was in fact said and done in a given lecture violates neither the First nor the Fourteenth Amendment, nor does it abort academic freedom.

Appellant in his Jurisdictional Statement has asserted four propositions in support of his contention that substantial federal questions are involved in this case. These contentions appear at pages 17 - 31 of the Jurisdictional Statement and concern alleged violations of the First and Fourteenth Amendments claimed to arise solely from an obligation to answer questions related to subversive activities.

It is respectfully submitted that none of the questions asked violate any constitutional rights of Appellant. The questioning was done courteously, and in no sense offensively except perhaps to those who take great offense at any compulsory process whatever. It is believed important to observe that the transcript of questioning of Appellant itself, revealed by Appellant's own answers, contains quite a number of tracks in the snow which could not help but lead an investigator, be he State or Federal, to believe it quite relevant to question Appellant concerning not

only what he said but what he meant by what he said. Amongst these tracks in the snow were affiliations with organizations cited by the United States Attorney General or by the House Committee on Un-American Activities, United States House of Representatives, as Communist-controlled. Of course, such citation does not establish either the fact of Communist control nor criminality, *per se*, nor subversiveness of membership therein or activities therefor and it is not contended here that it does.

But it does indicate that somebody for some purposes, whether a Federal loyalty-security program or general public information, believed upon some basis (usually a transcript of sworn testimony) that Communists were in control of organizations which Appellant worked in behalf of either as a member or otherwise over a long period of time. The *Report of Subversive Activities in New Hampshire* dated January 5, 1955, p. 176, identifies the leadership of the Progressive Party in New Hampshire and further identifies many of these individuals as members of the Communist Party. On page 179 of this report, the Appellant's affiliation with the Progressive Party is set forth for years 1947 through 1952. With this background it is noted that on October 7, 1954, Matthew Cvetic, a former FBI informant, testified before the Senate Internal Security Sub-committee and stated:

> "The Progressive Party . . . was set up by the organizational committee and also the political commission of the Communist Party . . : The personnel that moved around within the framework of the Progressive Party in key positions were assigned out of the Communist Party office . . . In other words, it was controlled by planted key Communist agents, who had absolute control of the Progressive Party."

This raises a series of compelled questions about Appellant's activities to any Committee charged with the duty of investigation to determine whether subversive persons or subversive organizations are located within the State.

This is particularly true when as the result of a document furnished to the examiner by Appellant himself in the course of

the original questioning in executive session (T. 64, l. 39) it appeared that Appellant co-edited the *Monthly Review* and in one of the 1953 issues discussed his concept of "Socialism" in the following way (T. 69, line 11):

> "And as regards the leaders of the two camps, it is certain that in the last eight years the United States has been responsible for killing a vastly greater number of human beings than has the Soviet Union."
>
> . . . . . .
>
> "So far as the United States and its allies are concerned, there is unfortunately no doubt about the answer. Our Country is preparing to practice violence on a hitherto undreamed-of scale to preserve a social order which in the space of four decades has already produced the greatest orgy of violence in the whole long and violent history of the human race. Capitalism, the organization of society according to the barbaric principle of private profit, is the scourge of mankind; and violence designed to preserve it is doubly damned once for itself and once for its purpose."
>
> "Those of us who have socialism in our bones, who believe that a truly human society can be erected only on the basis of common ownership and economic planning, must necessarily judge the violence of the socialist countries differently. We hate it, as we hate all violence; we would have vastly preferred to have the building of the new economy take place peacefully and painlessly, as it could have if the advanced countries had led the way. But history—which, as Friedrich Engels once said, is a most cruel goddess—decreed that the economic foundations of the society of the future must be laid in backward countries, not only without the assistance of the advanced countries but against their ruthless and implacable resistance. It was thereby rendered inevitable that the process should be difficult, painful, and violent. But the process does go forward—of that the majestic successes of the Soviet economy, despite all the strains and trials to which it has been subjected in these

> years of Hot and Cold wars, is irrefutable proof—and the hopes of mankind for a better future go with it. For the first time in history we can say that violence is being used to protect regimes which are doing their utmost to create a society which will be able to dispense with violence. That makes all the difference."

This statement is at least replete with approbation of the use of violence against the American system by indirection. This statement must be read in the light of the witness' affirmative answer (T-68, 1. 35), "I consider myself a Marxist, yes." It should be read in light of the question at page 66, line 40 of the transcript. "Didn't you tell the class at the University of New Hampshire on Monday, March 22, 1954, that Socialism was inevitable in this Country?" A. "I decline to answer any question about the content of my lecture at the University of New Hampshire." Q. "What grounds?" A. "Grounds that it is irrelevant to the scope of your inquiry and an invasion of First Amendment rights."

". . .

> *Mr. Wyman*: Isn't it true, Mr. Sweezy, that the socialism you have been advocating, exists only in Communist countries today?
>
> *Mr. Sweezy*: Yes, that is true. Britain hasn't actually succeeded yet in establishing a socialist system.
>
> ". . ." (T. 35, 1. 18-21).

The attention of the Supreme Court of New Hampshire was respectfully and particularly directed to the questions and answers which followed the above quotations, through line 10, page 93 of the transcript. It does not need to be taken by assumption to postulate that the truthful, objective education of youth in our State University is a matter of prime importance to the welfare of The State of New Hampshire, the nation, and hence of prime concern to the Legislature of this State.

See *Adler* v. *Board of Education*, 342 U.S., 485, 493. (1952)

Adolescents in most instances cannot be in a position to adequately evaluate doctrinal presentations either from experience in life or scholarly research. They are just not old enough to know whether it is really true that a nation is good or a political philosophy is good or whether they are evil. For an admitted Marxist to flatly state to assembled youth that Socialism in the United States of America is inevitable, raises all manner of relevant questions particularly after the earlier characterizations by Appellant of what he meant by use of the term. It makes little difference that the statement may have been enveloped in the pedagogical pretense that it was set up as one man's point of view, knock it down if you can. It is certainly competent and entirely relevant to ask whether such a Marxist in fact explained to the class what he meant them to understand by the word "Socialism."

Socialism to a Marxist may mean an entirely different social structure of society than the socialism of a follower of Norman Thomas or the broad general position on socialism of some of the British Labor Party adherents. It may mean a structure to be arrived at through violence if necessary to change from capitalism. The point, is, what actually was said to these students? Was there advocacy of alteration of our form of government through ultimate use of force and violence if need be? Can it be possible that in this State the so-called rights of privacy contended by defendant would extend the oft-tortured concept of academic freedom to close the classrooms of New Hampshire to legislative investigation? The defendant asked the Supreme Court of New Hampshire to rule as a matter of law that a legislative committee cannot cross-examine a witness concerning the content of his lecturing once the witness has denied that he advocated subversive doctrine. If this type of argument be sanctioned by a rule of law, all any witness would have to do would be to make the statement under oath that he had not advocated subversive doctrine and from then on to find the facts it would be necessary to pit student informer against teacher or shut the door on formal inquiry. It is perfectly possible that a witness

might aver under oath that he had not advocated subversive doctrine when in fact he had done so, whether intentionally or otherwise. The fact-finding process in such a situation requires questioning under oath. And while it is common knowledge that an oath under our juridical system means nothing to a communist; that for them there is no compulsive force of conscience, faith in Almighty God, or other Christian responsibility to impel compliance with capitalistic law; nevertheless, the dangers inherent in perjury are a practical encouragement to truthful disclosures.

The New Hampshire Legislature has made it a crime in this State to aid, advocate, teach, or abet even the alteration of our constitutional form of government if the formula includes ultimate resort to force and violence if necessary. RSA NH 588 (Laws 1951, chapter 193). One of the most common approaches utilized by present and former communists to the question of force and violence in answering the questions of legislative or congressional investigators is to say that they never saw or urged anything having to do with forcible overthrow of the government of state or nation and if they had they would not have had anything to do with the Communist Party. Perhaps it is not for counsel at this point to speculate whether such people kept up with current events during their years of communist predeliction but is it not possible to advocate resort to force and violence to destroy the capitalistic system and hence the Republic of the United States of America (and *a fortiori* the Sovereign State of New Hampshire) by indirection?* Is it not subversive to advocate the laying down of our arms if a calculated preliminary to occupation by the Soviet Union? If violence to preserve capitalism is "doubly damned" but violence to establish the type of social order of which the defendant has written and spoken is praised, is not the New Hampshire Legislature entitled to inquire when such double talk enshrouds representations of inevitable "Socialism" to boys and girls at our State University? It is interesting to balance these questions with the Appel-

* See, *U. S. News & World Report*, Issue of Oct. 21, 1955, pp. 37-41; 138

lant's background, which is a matter of public record, and the Jurisdictional Statement, p. 5, that "Dr. Sweezy is a distinguished economist and a well-known authority upon socialism, with a reputation for honesty and integrity in the academic profession." This statement is made by counsel for the Appellant and by another witness (Daggett) himself under investigation and in Court at the time.

The Appellant on his own exceptions before the New Hampshire Supreme Court raised the issue of possibilities. He contends that no possible answer to questions about the lecture on March 22, 1954 could relate to subversion as defined in New Hampshire's basic law. Appellant said he did not advocate nor in any way further the aim of overthrow of constitutional government by force and violence. (T-59, l. 2). Being aware of the Appellant's background and knowing of the compulsory attendance of the students in this class at a State-supported institution is it not relevant and reasonable for the legislature to ask, what did he say? What did he take with him into the lecture room? What was distributed to the students? Was the mimeographed subsequent reconstruction of the notes contained in the lecture, and hence of its content, all that was said? Was the witness then a member of any organization cited by the United States Attorney General as subversive or communist controlled or required by proceedings before the Subversive Activities Control Board to register as such? The language of the Supreme Court of New Hampshire in *Nelson* v. *Wyman*, 99 N. H. 33, appears to provide an answer:

> ". . . The inquiry is not confined to an investigation of violations of the act but includes a determination of whether there are presently in this state . . . persons whose acts are not criminal but who are classified as subversive persons because they either *not* 'knowingly and wilfully' are . . . aiding in the commission of acts intended to . . . alter existing government by force or violence. . . . or are advocating or teaching the commission of such acts . . . even though they do *not* do so 'knowingly and wilfully' . . . , or are members of sub-

versive organizations *not* knowing them to be such . . . " (P. 37)

"Among the matters as to which the Attorney General was directed to inquire were the commission of, or attempts to commit, acts intended to overthrow the government by force or violence after August 1, 1951, *whether or not done 'knowingly and wilfully'* . . . "(P. 39) [Emphasis Supplied]

Did this witness tell students at the University of New Hampshire in this lecture that Red China was a land of peace, and Formosa a land of war; that the Soviet Union and world communism wanted peace, whereas the barons of Wall Street want war; that the only way to assure world peace was to lay down our arms and become one world with communism, living under a socialistic, classless society with the profit motive removed? Was all of this, if said (and no contention is made here that it was in fact said, but these propositions are discussed merely for reaching the possibilities raised by the Appellant himself) was it all part of a plan to orient our youth toward abolition of a constitutional republic with approval of violence for these purposes but not of violence in defense of capitalism?

III. Fact-finding inquiry to determine the nature and extent of potential danger is a question of policy for the legislative branch of government.

How far does human conduct under New Hampshire laws have to extend before one reaches the twilight zone warranting questioning to determine the true facts? Does a witness have to actually stand up and say, "I urge you to go out and march on Wall Street, to overthrow the Supreme Court and the Legislature and the Government by force and arms if they won't abdicate peaceably, and set up a people's government, a world government of the proletariat?" Is it not probable that substantial education, such as is this Appellant's unique qualification made available to him in his life by the opportunities of self-advance-

ment under the same capitalistic system which he so often and so publicly deprecates, enables a vastly more subtle approach? And if such a vastly more subtle approach should be used in a state-supported institution of learning, is it not a legitimate concern of the Legislature?

See: *Gitlow* v. *New York*, 268 U.S. 652 (1925)
Whitney v. *California*, 274 U.S. 356, 71 L. Ed. 1095 (1927)

It is of vital consequence that it be recognized that the Appellant Sweezy was not on trial in the course of his original committee questioning. No charges had been brought against him. He was only a witness, not a defendant. The questioning was in private but could have been in public had appellant desired. He was represented by counsel of his own choice at his second hearing. He did not wish counsel at the first. He could not be compelled to incriminate himself out of his own mouth because he always had (and was so instructed by the Attorney General and by his own counsel) available to him his constitutional privilege against self-incrimination.

Cf: *Rogers* v. *U. S.* 179 F. 2d 559, 340 U.S. 367, 95 L. Ed. 344. (1951)

IV. An investigating committee does not have the burden of producing evidence of ultimate facts before its questions become pertinent.

In the course of questioning, Appellant Sweezy maintained that beyond denying that he had advocated subversion in his lecture and affirming that he is not and never has been a member of the Communist Party, he was not obliged to answer further questions until the committee produced evidence before him to the contrary. The Supreme Court of New Hampshire rejected this contention, saying:

"'It is not always easy to distinguish teaching or advocacy in the sense of incitement from teaching or advocacy

in the sense of exposition or explanation.' *Dennis* v. *United States*, 341 U.S. 494, 572. The distinction is one of fact. The defendant's denial that he advocated, taught or in any way furthered the aim of overthrowing constitutional government by force or violence in his lecture is simply his determination of that fact, which the committee could believe or not as it saw fit. The witness could not by his answer impose upon the investigating committee the burden of producing evidence that a doctrine aimed at the violent overthrow of existing government was in fact advocated by him before it could inquire of him concerning the lecture." *Wyman, Attorney General* v. *Paul M. Sweezy*, 100 N.H. 102, 108, 121 A. 2d 783 (dec'd Mar. 6, 1956)

While the Attorney General as a delegated legislative committee was ordered to find out whether there were subversive persons or subversive activity as defined in RSA 588 (Laws 1951, chapter 193) in the State of New Hampshire, he was also directed to ascertain whether there were any subversive organizations operating within the state. To find out whether an organization is or was subversive it is necessary, among other things, to inquire whether it has within its membership persons who urge resort to force and violence if necessary to alter our government. The Preamble of the Act itself indicated the Legislature considered communists to be subversive *per se*. No more than a reading of the Preamble is necessary to establish this proposition beyond reasonable doubt. In fact it is no longer open to argument in New Hampshire that the Communist Party or communism itself is a mere matter of legitimate political affiliation, activity or expression. *Preamble, Laws 1951, chapter 193; Cf., Communist Control Act of 1954*, 50 U.S.C. 841. Even were a person to assert today that he was a new kind of communist who did not believe in or advocate resort to force and violence to effect a communist America, his protestations in light of the record and the law in New Hampshire should reasonably receive short shrift by any responsible finder of fact.

See: *American Communications Ass'n.* v. *Douds*, 339 U.S. 382, 408, 94 L. Ed. 925, 949 (1950); (Mr. Chief Justice Vinson)

"If the principle that one may under no circumstances be required to state his beliefs on any subject nor suffer the loss of any right or privilege because of his beliefs be a valid one, its application in other possible situations becomes relevant. Suppose, for example, that a federal statute provides that no person may become a member of the Secret Service force asigned to protect the President, unless he swears that he does not believe in assassination of the President. Is this beyond the power of congress, whatever the need revealed by its investigations? An affirmative answer hardly commends itself to reason unless, indeed, the Bill of Rights has been converted into a "suicide pact. ... ."

". . . Second, the public interest at stake in ascertaining one's beliefs cannot automatically be assigned at zero without consideration of the circumstances of the inquiry. If it is admitted that beliefs are springs to action, it becomes highly relevant whether the person who is asked whether he believes in overthrow of the Government by force is a general with 500,000 men at his command or a village constable. To argue that because the latter may not be asked his beliefs the former must *necessarily* be exempt is to make a fetish of beliefs. The answer to the implication that if this statute is upheld 'then the power of government over beliefs is as unlimited as its power over conduct and the way is open to force disclosure of attitudes held on all manner of social, economic, moral and political issues,' [*Post*, p. 438], is that that result does not follow "while this court sits." The circumstances giving rise to the inquiry, then, are likewise factors to be weighed by the courts, giving due weight, of course, to the congressional judgment concerning the need. In short, the problem of balancing the conflicting individual and national interests involved is no different from the prob-

lem presented by proscriptions based upon political affiliations.

"Insofar as a distinction between beliefs and political affiliations is based upon absence of any 'overt act' in the former case, it is relevant, if at all, in connection with problems of proof. In proving one sworn falsely that he is not a Communist, the act of joining the Party is crucial: Proof that one lied in swearing that he does not believe in overthrow of the government by force, on the other hand must, consist in proof of his mental state. To that extent they differ.

"To state the difference, however, is but to recognize that while objective facts may be proved directly, the state of a man's mind must be inferred from the things he says or does. Of course, we agree that the courts cannot 'ascertain the thought that has had no outward manifestation.' But courts and juries every day pass upon knowledge, belief and intent—the state of men's minds—having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred. . . ."

In regard to the Progressive Party, as perhaps with any "Party" or group or assemblage, the question immediately is raised as to who made its policies? Were there subversives in it? What were the policies? How many communists or former communists were in it? Was it a subversive organization within the meaning of New Hampshire law? How can the true facts be found if answers are not compelled under oath?

The transcript shows the names of a number of individuals about whom Mr. Sweezy was asked in respect to activities within the Progressive Party. Such questions and answers specifically are found in the transcript at page 53, line 25. It is not believed reasonable nor necessary that a legislative committee should be required to aver under oath to a witness that these individuals were or had been members of the Communist Party, or, worse

yet, to produce the transcripts containing such evidence, thus informing the witness who said what and possibly subjecting such individuals to recriminations of the most direct order.

See: *Marshall* v. *United States*, 176 F. 2d 473. (1950)

To find out whether known communists or individuals reported to be communists were operating within the Progressive Citizens of America and or within the Progressive Party at a policy level, is quite pertinent. The association of individuals acting in concert with communists in an organization over any protracted period of time is at least an indication that communist influence was known because a communist by definition (if he is indeed a real communist) is subject to the Party line and is not a free agent nor a free individual, but on the contrary is committed to act in furtherance of the Soviet communist conspiracy to subvert and enslave the world. This sounds not a little fantastic in New Hampshire but when the facts on the pages of history are added up since 1917, they paint a grimly corroborative picture. As the Supreme Court of New Hampshire has held, in *Nelson* v. *Wyman*, 99 N.H. 33, the Legislature of New Hampshire has the power to direct a committee to ask any citizen in this state relevant questions concerning his activities in association with communists or with any organization when that organization is communist or communist-controlled, or operates as a communist front or is believed by the committee to so operate.

See: *Dunne* v. *United States*, 138 F. 2d 137; Cert. Den. 320 U.S. 790, 88 L. Ed. 476; Rehearing den. 320 U.S. 814, 88 L. Ed. 492; Motion for Leave to File Second Petition for Rehearing granted and Rehearing denied, 320 U.S. 815, 88 L. Ed. 493 (1943).

Emspak v. *U.S.*, 95 F. Supp. 1012 (1951); 91 U.S. App. D.C. 378, 203 F. 2d 54, 349 U.S. 190; 99 L. Ed. 997 (1955)

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934, 94 L. Ed. 1352; Rehearing denied 339 U.S. 972, 94 L. Ed. 1379 (1950)

Rumely v. *U.S.*, 345 U.S. 41 (1953)

United States v. *Fitzpatrick*, 96 F. Supp. 491, 493 (1951)

United States v. *Josephson*, 165 F. 2d 82 (1947)

United States v. *Petrillo*, 332 U.S. 1 (1947)

United States v. *Thomas*, 49 F. Supp. 547 (1943)

The mere asking of relevant questions pursuant to a law which the Supreme Court of New Hampshire has held to be constitutional does not abridge either freedom of speech or freedom of religion or any of the provisions of the Bill of Rights. *Barsky* v. *United States*, 167 F. 2d 241, (App. DC 1948) Cert. Den. 334 U.S. 843; *Dennis* v. *U. S.* 341 U.S. 494 (1951); *Dunne* v. *United States, supra; Emspak* v. *U. S.*, 349 U. S. 190 (1955); *Nelson* v. *Wyman*, 99 N. H. 33, 105 A. 2d. 756 (1954); *Townsend* v. *U. S.*, 95 F. 2d 352 (1938). How can the Legislature do its work if it is powerless to compel answers in such a field?

Cf., McGrain v. *Daugherty*, 273 U.S. 135 (1927)
United States v. *Bryan*, 72 F. Supp. 58 (1947)

To rule as a matter of law that the Legislature of The State of New Hampshire is powerless to inquire of any lecturer as to what he actually said at a state institution when that same Legislature by separation of powers is responsible for finding facts in aid of legislation, is to torture the First Amendment to indulge the paranoia of academic freedom extremists. Confining the problem to the precise factual situation presented on this record, we find a State institution supported by State tax-raised funds and the preposterous contention of the Appellant that a legislative committee engaged in a subversive investigation is without authority to cross-examine witnesses as to the content of their lectures thereat. This cannot be sound morally or legally. In fact, it is so manifestly unsound and the consequences of a ruling prohibiting such questioning would be so disastrous in its impact.

not only upon affairs in this State but all across the nation, that it is difficult to believe the contention to be raised in seriousness. Even the most liberal advocates of academic freedom do not contend that a legislative committee is powerless to ask pertinent questions about what goes on in the classroom.

See: Opinion of the Justices, 96 N. H. 530 (1950)
Marcello v. *U. S.*, 196 F. 2d 437 (1952)
U. S. v. *Di Carlo*, 102 F. Supp. 597 (1952)

The problem of whether such an investigation should be undertaken in the first place is one of policy for the Legislature, not for the judiciary. It is to the Legislature that most of the arguments of appellant should properly be addressed.

V. The witness must respond to a pertinent question or exercise proper constitutional reason for refusal.

Appellant also contended in refusing to answer questions relating to named individuals active in the Progressive Party in earlier years in New Hampshire that the committee must first identify such individuals as subversive before he was required to answer. On this point the Supreme Court of New Hampshire said, in emphasizing the obligation of the committee to investigate to accumulate facts seeking to find out whether or not the Progressive Party, as such, is or was Communist controlled in New Hampshire:

> "It is on information of this sort that a determination concerning the nature of an organization may be made by a legislative investigating committee. Whether the persons referred to in the questions were or were not in fact Communist Party members or subversive persons is not decisive of the issue of relevancy and the defendant was not entitled to proof of that fact before being required to answer. The questions called for answers concerning the membership or participation of named persons in the Progressive Party which, if given, would aid the Attorney General in determin-

ing whether that Party and its predecessor are or were subversive organizations. They were accordingly relevant to the subject matter of the investigation." *Wyman, Attorney General* v. *Paul M. Sweezy*, 100 N.H. 103; 112. (dec'd, Mar. 6, 1956)

It should always be remembered that if there is nothing subversive involved in his activities all a witness needs to do is say so *and explain*, but he has no right in our judicial and constitutional system to refuse to answer a *pertinent* question on any basis other than that a truthful answer might incriminate him. *The mere questioning is not censorship*. The mere asking of questions is not indictment and it is not a charge. If the witness is within the zone of lawful conduct as interpreted by the highest courts of our State and Nation, his testimony in substance can always be summarized as, "Sure, I've said these things—so what?" but he must answer.

It is impossible to ask a single all-embracing question that would present the entire picture in this type of investigation. Each series of questions involve steps in a process of deductive or inductive reasoning. To determine the relevancy of any particular isolated question, it is both reasonable and quite necessary that it be considered in light of the context of the group of which it is an essential part.

VI. Being a fact-finding investigation, no criminal prosecution is involved and Pennsylvania v. Nelson is not applicable.

There remains for consideration Appellant's fourth contention in his Jurisdictional Statement that both the New Hampshire Subversive Activities Act of 1951 (RSA 588) and the Resolutions calling for a legislative fact-finding investigation are invalid by reason of the decision of this Honorable Court in *Pennsylvania* v. *Nelson*, 350 U.S. 497, 100 L. Ed. 415. For the purposes of a decision in clarification of the precise holding in the Steve Nelson case, it is believed that other things being equal, a decision on this point in the principal case would be desirable. *However*, the case

before the Court on Appellant's Jurisdictional Statement does not involve a criminal prosecution. It does not involve an attempt by a State to enforce a law making it a crime to seek to overthrow the government of the United States.

All that is involved here is the right of a State to investigate in aid of legislation. Nothing in *Pennsylvania* v. *Nelson* remotely purports to invalidate state legislative *investigations*. In fact, in the decision in *Pennsylvania* v. *Nelson*, this Honorable Court was quite careful to point out that it did not void provisions of State law insofar as they made it a crime in the States to attempt to overthrow the Federal Government by unlawful means, but merely suspended their enforceability so long as the Federal *Smith Act* remained on the books. The decision in *Pennsylvania* v. *Nelson* did not seek to invalidate nor even suspend State laws aimed at sedition against the *States* themselves. Chief Justice Warren, writing for the majority, expressly said:

> "The precise holding of the court, and all that is before us for review, is that the Smith Act of 1940, as amended in 1948, which prohibits the knowing advocacy of the overthrow of the government of the United States by force and violence, supersedes the enforceability of the Pennsylvania Sedition Act which proscribes the same conduct." 350 U.S. 497, 499.

So far as Appellant in his Jurisdictional Statement at page 32 asserts that a State investigation after the Steve Nelson decision would serve no legislative purpose, it is obvious that there are a plethora of avenues to permissive legislation by a State as a result of facts found in such an investigation and these might be laws which in no way, shape or manner would offend the decision in *Pennsylvania* v. *Nelson*. For example, a State legislature might wish, for State purposes, to broaden or change its local immunity statute. It might wish to provide for a State agency before which organizations operating within the State in corporate form and cited by a fact-finding committee, should appear to determine whether or not their charters should be revoked as a consequence

of advocacy of overthrow of the State government by force and violence. It might wish to enact legislation providing for a permanent staffing of its Attorney General's office with personnel in a subversive division with appropriate powers, duties and authority. All these and many more legislative possibilities within a State, depending upon the facts, justify beyond question the statement that a State legislature is entitled to use the fact-finding process (which, after all, must be the very foundation of legislation) as an aid to determining whether legislation in no wise outlawed by *Pennsylvania* v. *Nelson* is needed within the State.

See: *Watkins* v. *United States*, CADC April 23, 1956, 24 U.S. Law Week 2497.

Again and again, Appellant and too many others in this country, have raised the smokescreen that such investigations stultify freedom of speech and block the channels of public discussion. This same distortion of fact and self-serving contentious overplay appear in the Conclusion to the Jurisdictional Statement at page 32, where Appellant asserts that the power of legislative inquiry in New Hampshire has been used to block public discussion in the academic community and in the arena of political organization. This is completely untrue and no one knows it any better than Appellant.

Nothing in the mere asking of questions blocks public discussion nor suppresses free speech. How can there be suppression when a witness is merely asked what he said? Why shouldn't he tell the State what he said? He may simply answer if it was not unlawful. If not, he has available his privilege against self-incrimination. But beyond that he may not refuse to answer.

> "The United States Supreme Court has consistently recognized the inherent value of free discourse. However, it is settled that the right to free speech is not an unlimited, unqualified right, but, as the Court said in *Dennis*, 341 U.S. at page 503, 71 S. Ct. at page 864: '. . . the societal value of speech must, on occasion, be subordinated to other values

and considerations.'" *United States* v. *Lightfoot*, 228 F. 2d 861, 869; Certiorari granted 350 U. S.———, 76 S. Ct. 543, (March 26, 1956)

See: *State* v. *Chaplinsky*, 91 N. H. 310 (1941)

Schenck v. *United States*, 249 U.S. 47 (1919)

But even the above quotation is unduly somber as applied to the principal case because the quotation deals with substantive law and the principal case only with investigation. It cannot possibly restrict freedom of speech to be required merely to tell what was said. Persons in the position of Appellant are still free to give any lecture or make any statement or take any material with them, subject always to the limitation on that conduct which becomes criminal as specified in the *Subversive Activities Law of the State of New Hampshire*, (RSA 588) as well as to the restriction of certain other statutes in New Hampshire, such as RSA 587:32, which makes it a crime in New Hampshire to

> ". . . advocate or encourage by any act or in any manner, or bring into this state, prepare, produce, publish, distribute, or have in possession for distribution, any printed or written matter of any kind, including pictures, which so advocates, encourages, or favors the overthrow of, or change in the form of, the government of the United States of this state or any subdivision thereof, or the interference with any public or private right by force, unlawful means, or act of violence." . . .

Even granting that *Pennsylvania* v. *Nelson*, (barring new federal legislation) strikes from such a statute as that immediately set forth above the words, "the government of the United States or" it has been held explicitly by the highest Court of the State of New Hampshire that the Legislature of the State of New Hampshire has the right to conduct a fact-finding investigation to determine whether or not such unlawful activities have taken place. The question of policy as to whether there is to be such an investigation—originally or by continuation—is for the Legislature, not the judiciary. *Kahn* v. *Wyman*, 100 N. H.

——, (dec'd. June 8, 1956), Appendix Jurisdictional Statement, p. 63.

Appellant has not claimed the privilege against self-incrimination in refusing to answer. On the contrary, he has wilfully refused to answer the questions of the Legislature of New Hampshire on the sole grounds that the mere asking of these questions violates the First and Fourteenth Amendments of the Constitution of the United States. He also alleged that certain very similar constitutional rights under the Constitution of New Hampshire were also violated, but this question has been foreclosed by the negative answer of the Supreme Court of New Hampshire in the case from which this appeal to this Honorable Court is taken.

CONCLUSION

This Honorable Court has itself said in *Adler* v. *Board of Education*, 342 U.S. 485, 493:

> ". . . A teacher works in a sensitive area in a classroom. There he shapes the attitude of young minds toward the society in which they live. In this the state has a vital concern. It must preserve the integrity of the schools."

The principal case involves nothing more and nothing less than an effort of a State legislature to find out by relevant questioning whether the integrity of its schools has been preserved. Neither the suppression of free speech nor stultification of individual initiative nor invasion of constitutional civil liberties is involved in the questioning presented on the record in the principal case. Considering the background of Appellant as shown in the transcripts which are themselves a part of the record in the principal case, including his own separate writings and his own answers, it is entirely reasonable and proper that the State should investigate to determine whether he advocated subversive doctrine to compulsory adolescent attendants at his lectures at a State-supported University. The consequences of denying to a State the right to make such reasonable inquiry would be to leave un-

restricted and practically immune the power of a State legislature to investigate the teachings, writings and other activities within the classrooms of America.

The academic world in its daily work is as much subject to the rules and mores of our society as any other segment. Advocacy of subversive doctrine is a violation of law in New Hampshire. The right of a State legislature to compel a witness to answer relevant questions in an effort to determine whether there had been advocacy of such subversive doctrine is not to be met by empirical denials and refusals to accede to a reasonable latitude of fact-finding examination. A witness in the position of Appellant, faced with a relevant question, must either answer or claim his privilege against self-incrimination in refusing. To sanction any other course is to undermine the very structure of legislative process. No substantial federal question is involved in this case.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By: LOUIS C. WYMAN, Attorney General

July 12, 1956.

BRIEF FOR APPELLEE

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OCTOBER TERM 1956

No. 171

PAUL M. SWEEZY, Appellant

v.

LOUIS C. WYMAN,

Attorney General of New Hampshire, Appellee

Appeal from the Supreme Court of The State of New Hampshire

BRIEF FOR APPELLEE

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1956

No. 175

PAUL M. SWEEZY, Appellant

v.

LOUIS C. WYMAN

Attorney General of New Hampshire, Appellee

Appeal from the Supreme Court of
The State of New Hampshire

BRIEF FOR APPELLEE

QUESTIONS PRESENTED

I. Are state legislatures precluded from fact-finding investigation in aid of possible legislation relative to subversive activities within their borders, by the decision of this Court in *Pennsylvania v. Nelson*, 350 U. S. 497 (1956)?

II. Does the First Amendment to the Federal Constitution confer such a right of personal privacy as permits a witness to refuse to answer questions otherwise relevant to a subject constitutionally under fact-finding investigation by a State Legislature?

III. May a witness, merely by a general denial of subversive activity or of knowledge thereof, foreclose further pertinent questioning into his activities in the nature of cross-examination by a legislative fact-finding committee?

STATEMENT OF THE CASE

This is an appeal by Paul M. Sweezy from a decision of the Supreme Court of New Hampshire directing that he answer certain questions of a legislative fact-finding committee investigating subversive activities in New Hampshire. The Supreme Court of New Hampshire had previously found the investigation constitutional. *Nelson* v. *Wyman*, 99 N. H. 33 (1954). By the terms of the resolution authorizing the investigation Laws 1953 chapter 307, the committee (Attorney General) was directed to find out whether there were subversive persons or subversive organizations in New Hampshire; to prosecute those appearing to have violated the law; and to make recommendations concerning further legislation considered necessary in this field.

The questions directed to Sweezy and involved in this case were found by the Court to be relevant and pertinent to the resolution and to the basic state law (RSA 588). They appear, together with the reasons assigned for the refusals to answer, in the Record at pp. 202-208. They were concerned with two general subjects: (1) the actual content of a required lecture at the State University, (2) persons active at the policy level in the Progressive Citizens of America and the Progressive Party. Beyond a general denial of advocacy of force and violence Sweezy declined to answer all questions concerning the content of his lecture at the State University (R. 70), and many questions directed to discovery of activities of named individuals within the Progressive Party and the Progressive Citizens of America (R. 63). He further refused to answer the question of whether he believed in Communism (R. 77, 205) as well as many questions directed to disclosure of the identity of certain named individuals independent of their affiliation with the Progressive Party or its predecessor or any other organization (R. 100). The questions

to which the court proceeding relates and which are involved in the present appeal appears in the Record at pp. 202-208. Sweezy was questioned twice. The first time on January 8, 1954 and the second time on June 3, 1954. On both occasions the questioning took place in private according to the Rules of Procedure (Appendix E). The witness did not request a public hearing. On the occasion of the January hearing Sweezy did not wish counsel and declined to answer many questions relating to the Progressive Party (R. 33-35, 49-57) or in regard to his acquaintance with or knowledge of several named individuals. At the conclusion of this hearing the witness read a statement into the record in which he stated he would decline to answer questions concerning ". . . . ideas, beliefs and associations which could not possibly be pertinent to the matter here under inquiry and or which seem to me to invade the freedoms guaranteed by the First Amendment to the United States Constitution . . ." (R. 62). At the first hearing Sweezy testified that he did not know any members of the Communist Party in New Hampshire at that time (R. 21); that he knew Elba Chase Nelson (long-time secretary of the Communist Party in New Hampshire) but that he never knew her as a member of the Party (R. 22); that he was a former member of the American League Against War and Fascism (R. 24); that he did not remember whether he was once a member of the committee sponsoring the Citizens Committee for Harry Bridges (R. 25); that he helped in the defense of Carl Marzani (R. 26); that he would not dispute but what he was Chairman of the Committee to Defend Marzani (R. 26); that he was in the Office of Strategic Services during the war with Marzani and that Marzani was convicted in 1947 for concealing Communist affiliations while working for the Federal Government (R. 26); that in 1949 he was a sponsor and speaker at the Scientific and Cultural Conference for World Peace held by the National Council of the Arts, Sciences and Professions in New York City (R. 27); that he signed an open letter for support of the Civil Rights Congress (R. 29, 30); that he did not remember a letter in defense of the Moscow Purge Trails reported in the "Daily Worker" on February 9, 1937 (R. 32);

that he had frequently contributed to and written for "Science and Society" (R. 33); that he did not remember signing an open letter to Congress urging the defeat of President Truman's Arms Program in 1949, released by the Conference on Peaceful Alternatives to the Atlantic Pact.

Between the time of the first questioning of Sweezy, and the second in June of 1954, committee examination of publications by Sweezy revealed that in the "Monthly Review" (co-edited by Sweezy and one Leo Huberman) reprint, Pamphlet Series No. 6, (1953) Sweezy had written with Huberman a statement concerning the use of force and violence which appears at Page 20 of the Argument in this brief. Subsequently it was learned that Sweezy had delivered a lecture at a required course in "Humanities" at the University of New Hampshire on March 22, 1954. He was recalled in private session on June 3, 1954, on this occasion appearing with counsel.

In the course of his testimony on the second occasion Sweezy declined to answer no less than twenty-four questions and did not remember or did not know concerning answers to more than a dozen other questions. He testified that he considered himself a Marxist (R. 82) and reaffirmed the content of the writing which appears above (R. 108). In regard to questions directed to him concerning the lecture at the University of New Hampshire he again generally denied advocating or furthering the aim of overthrowing constitutional government by force and violence and said, "Aside from that I have nothing I want to say about the lecture in question." (R. 70) At this time Sweezy testified that he did not know of his own personal knowledge who is or is not a member of the Communist Party (R. 64), and that the Progressive Citizens of America was the forerunner of the Progressive Party in New Hampshire (R. 64). He then declined to answer questions directed to the names of individuals and/or their activities in the Progressive Citizens of America and later the Progressive Party (R. 65). He acknowledged attending a meeting also attended by persons known to him to be Communists in 1938 or 1939 in the vicinity of Boston, Massachusetts and that at that time he spent the evening with Granville Hicks and

Phil Frankfeld, but that he could not recall any discussion of overthrow of the government by force and violence (R. 79). At page 94 of the Record, asked whether he knew personally any Communists who do not have the intention of overthrow of the capitalist system by force and violence, Sweezy replied: "Let me put on the record again that personally I know very few Communists as such. I know quite a few people who may perfectly well be Communists and enough of them over a period of years so that I think I have some idea of what Communists think like and act like, but they are people whose membership in the Communist Party is not personally known to me; and for obvious reasons I would not testify about them as Communists without knowing." (R. 95) He acknowledged that while in the O.S.S. in Germany he met quite a few Communists at the closing stages of the war and testified that he had no doubt that Mrs. Nelson (Elba Chase Nelson) was a Communist prior to 1951 but that he had no opinion on whether Mrs. Nelson was a Communist at the time of the questioning (R. 113). Asked what he would require for a person to be personally known to him as Communist, Sweezy stated that it would have to be "a person who has been publicly identified and has been a spokesman for the Communist Party in one country or another and whom I personally have known . . . somebody who has been a Communist before the public whom I have known . . ." (R. 113). He refused to answer the question whether he believed in Communism (R. 77), but later, before the Superior Court, in again refusing he said "If the definition and characterization of Communism are those presented in the preamble to the 1951 Act, the answer to that is no. Beyond that, however, I decline to answer the question on advice of counsel and for reasons given by counsel." (R. 205)

Following the conclusion of the second hearing a petition was prepared and filed by the Attorney General with the Superior Court of Merrimack County seeking a court continuance of the questioning and an order directing the witness to answer or be found in contempt of court according to the provisions of New Hampshire law in such cases. (RSA 491:19, 20) At this time, after extensive argument between counsel consuming the better

part of two days, Sweezy took the stand in the New Hampshire Superior Court and again refused to answer the questions involved in this case (R. 201). These questions and the witness' refusal to answer appear in the Record at pages 201-208. At no time did the witness base his refusal to answer on the privilege against self-incrimination, but confined it solely to contentions of irrelevancy and violations of the First and Fourteenth Amendments of the Federal Constitution and their counterpart in the State Constitution. Following Sweezy's refusals the Court found him in contempt of court and he was admitted to bail in the sum of one thousand dollars pending his appeal to the Supreme Court of New Hampshire (R. 208).

On March 6, 1956, the New Hampshire Supreme Court in an opinion appearing at page 210 of the Record, found the questions to have been relevant and pertinent, to have been authorized by the Resolution and the investigation, and to violate no provision of the State or the Federal Constitutions. Subsequent to the decision this Court rendered its opinion in *Pennsylvania* v. *Nelson*, 350 U. S. 497, on April 2, 1956, and defendant moved for a rehearing before the New Hampshire Supreme Court on the specific ground of supercession. This motion was denied and by certificate the New Hampshire Supreme Court certified in this case that it has specifically held that the State statutes were not invalidated by the Nelson decision. See appellant's brief, Appendix C, page 78. Subsequently this point was reaffirmed by the New Hampshire Supreme Court in *Kahn* v. *Wyman*, 100 N. H. 245 (Dec'd. June 8, 1956). (Appellant's Brief, appendix B.)

SUMMARY OF ARGUMENT

This Court's decision in *Pennsylvania* v. *Nelson*, 350 U. S. 497 (1956), was confined by express terms to advocacy of the overthrow of the government of the *United States* by force and violence. The decision did not purport to cover those separable provisions of State law making it a crime to seek to destroy the *State* government by force and violence or other unlawful means. New Hampshire's Subversive Activities Law (RSA 588) is subject to separability. It is worded in the alternative and applies

proscription of unlawful attempts to overthrow the government of the United States OR of the State of New Hampshire OR either of them (RSA 588).

The decision in *Pennsylvania* v. *Nelson*, *supra*, was couched in terms of "suspending the enforceability" of state laws imposing criminal sanctions on such advocacy or activity directed against the *federal* government. This concept is distinct from voiding State statutes completely. If the status of those portions of State law relating to advocacy of overthrow of the *federal* government by force and violence are suspended and not void State legislatures may clearly continue to enact laws on the subject even if unable to enforce them until such time as the Federal government has abandoned the field or enacted recognition of concurrence.

In addition, among the many laws which States may still enact and enforce in the field of sedition are those relating to subversion directed against the State government alone. Seditious activity against the Federal government must unavoidably relate to the safety of each State government. This no language of any judicial decision can alter. Fact-finding in aid of State legislation of this type is still necessary for intelligent law making. Appellee admits that the State governments since the Nelson decision may no longer prosecute for violation of such parts of State law as make it criminal to advocate or overthrow solely the *federal* government by force and violence.

Without contending that the First Amendment is inapplicable to State action under certain previous decisions of this Court, and conceding for purposes of argument here its applicability to State action under the Fourteenth Amendment, it is nevertheless respectfully asserted that nothing in the record of the principal case is manifest of any action by the State of New Hampshire which suppressses, restricts, or otherwise destroys appellant's freedom of speech. Since *Dennis* v. *United States*, 341 U. S. 494 (1951) it is elemental that certain speech may constitutionally be made criminal. Included within such speech is that delivered under circumstances calculated to create a clear and probable danger to the security of State or Nation. *Gitlow* v. *New York*, 268 U. S. 652, 670 (1925). Fact-finding investigation of subver-

sive activities in New Hampshire, or any other State, or by a Congressional Committee, requires a reasonable latitude of cross-examination available to the investigating committee. Asking Sweezy what he said and did does not restrict what Sweezy said and did if otherwise lawful. If what he said or did was in fact criminal, or if he or any witness in a similar position before an investigating committee believes there is a substantial risk of prosecution for crime to give a truthful answer, the privilege against self-incrimination remains available. No claim of this privilege is here involved. Beyond this privilege within the zone of relevancy a witness in a fact-finding investigation must answer.

The New Hampshre Supreme Court has found both the investigation and the statute upon which it is predicated (RSA 588) to be constitutional. *Nelson* v. *Wyman*, 99 N. H. 33 (1954). It has also found the questions appearing in the record of this cause (R. 201-208) to have been relevant and pertinent within the law of this State. This decision under settled doctrine of this Court is conclusive of questions of relevancy for the purpose of argument here. *Albertson* v. *Millard*, 106 F. Supp. 635, 345 U. S. 242, 97 L. Ed. 983 (1953).

What Appellant seeks to accomplish by presentation of both the facts and argument in the manner in which these appear in Appellant's brief, is to raise a bogeyman of supposed suppression and repression in seeking to persuade this Court that investigation in aid of legislation ". . . deprives appellant of this right to express his views in accordance with democratic procedures or can deprive his hearers of the right to listen to such discussion." Appellant's Brief, p. 36. This is sheer nonsense. Characterizing fact-finding investigation as "inquisition" (Appellant's Brief, p. 39), interference with freedom of discussion (Appellant's Brief, p. 43), substantial abridgment of freedom of speech" (Appellant's Brief, p. 42), "an abridgment of political life and expression" (Appellant's Brief, p. 37) and a prohibition and harassment of political activity which punishes unorthodox political opinion, activity or association (Appellant's Brief, p. 31) is to unfairly and unreasonably misstate the true facts of this record or the relationship or impact of legislative in-

vestigation generally. If one thing is clear in 1957, it is that Communist activity is *not* a mere question of "political activity". See: *Amer. Comm. Assoc.* v. *Douds*, 339 U. S. 382 (1950); *Dennis* v. *U. S.*, 341 U. S. 494 (1951); Preamble, Communist Control Act of 1954, U. S. C. Title 50, Sec. 841.

Appellee respectfully contends that the statement appearing at page 17 of Appellant's Summary, that ". . . appellant answered all questions relating to the use or advocacy of force or violence, and all questions in the borderline area of Communist Party membership, activity and advocacy" is half-truth if not misstatement. Examination of the entire transcripts of Appellant's testimony indicates beyond question that his testimony in answer to questions relating to Communists, former Communists, or the activities of organizations cited as Communist controlled or infiltrated was less than candid. It cannot be that a witness may validly contend that such statements are true simply because the Committee did not itself identify persons about whom it inquired as Communists. No Committee is obliged to go to such lengths. See *Barenblatt* v. *U. S.*, (CCA DC, Jan. 3, 1957). In fact such a requirement might do serious injustice to the named individuals involved, particularly in a continuing investigation at a point at which the Committee did not feel it knew whether such was the fact or not.

The statement at page 19 of Appellant's Summary of Argument that New Hampshire statutes violate due process by arbitrarily imposing *sanctions* upon persons for innocent membership in "subversive organizations" is not supported by examination of the law. The general definition set forth in Sect. 1 of the New Hampshire Subversive Activities Law (RSA 588) imposes no sanctions. The felonies are prescribed in Sections 2 and 3. It is *not* a crime in New Hampshire for a person to be a member of an organization even one which is literally and actually subversive, unless he is a member ". . . knowing said organization to be a subversive organization. . ." (Section 3). The test is entirely individual and personal. Courteous questioning in private session such as occurred in the principal case does not violate the First Amendment's enjoinder that laws shall not abridge freedom of

speech or association. Nor does it invade or unreasonably interfere with academic freedom except in the view of a certain segment of the teaching profession whose views on this subject are so extreme as to rival their opposites in the *self-fancied savior of America* class.

If a witness has not engaged in subversive activity, in answering the questions of a fact-finding committee State or Federal, the witness should answer and is at liberty to reaffirm what he has said or done. He always has available to him the continuing protection of the privilege against self-incrimination. He cannot be forced to testify against himself. Beyond this it is surely unreasonable to permit him to merely deny knowledge of subversion and then refuse to answer further relevant questioning in an effort to ascertain what in fact he did or said. Maybe he is not telling the truth in his general denial. Perhaps in arriving at his conclusion of general denial he has taken basic facts so unrealistically as to make the conclusion itself unworthy of credibility. This is certainly true of witnesses who deny knowledge of subversion on the ground that in their view there is nothing subversive about the Communist Party or its tactics, strategy and objectives and that all such activity is mere "politics." See: "COMMUNISM: MARXISM-LENINISM Its aims Purposes, Objectives and Practices" *American Bar Association Brief "The Communist Party, Its Tactics, Strategy and Objectives"*, Chicago, 1951. *Cf.* Communist Control Act of 1954. Such views have been expressed by increasing numbers of hostile witnesses of late and would assuredly become commonplace should this Court recognize such general denials as conclusive of committee power to question further.

To give judicial credence to the argument made by Appellant in this case would be to make a roadblock of the First Amendment which would abort all legislative (or Congressional) investigation, not merely in the field of subversive activities but in other fields as well. To permit the use of the First Amendment as a reason for declination to answer gives the power to witnesses to completely thwart the investigative process, for who will decide where the boundaries may be? The proper test, as

established by decisions of many lower federal and State Courts, must and should remain one of relevancy and pertinency, assuming that an investigation is founded on a constitutional statute and meets the settled tests of separation of powers, vagueness, and delegation.

See: *United States* v. *Orman*, 207 F. 2d 148, 155 (1953);
Rumely v. *U. S.* 345 U. S. 41 (1953);
U. S. v. *Josephson*, 165 F. 2d 82 (1947), Cert. Denied 333 U. S. 838 (1948);
Barenblatt v. *U. S.* (CCADC Jan. 3, 1957);
Sacher v. *U. S.* (CCADC Jan. 1957);
Watkins v. *U. S.* (CCADC) 233 F. 2d 681, Cert. Granted 352 U. S. ——; 77 S. Ct. 62 (1956);
State v. *Arnold* (Ct. of Common Pleas of Ohio, Summit Cty. Oct. 8, 1954) 124 N. E. 2d 473 (1954);
State of Ohio v. *Morgan*, 164 Ohio St. 529, 133 N. E. 2d 104 (USSC Appeal pending, citations unavailable) (1956);
Nelson v. *Wyman*, 99 N. H. 33, 121 A. 2d 783 (1954)

In order to be able to legislate intelligently, both State Legislatures and the Congress of the United States must be informed. In order to be informed they must have facts. The fact-finding process unavoidably involves compulsory disclosure and compulsory testimony. Nothing in the mere asking of relevant questions unreasonably restricts either freedom of speech or freedom of association. *U. S.* v. *DiCarlo*, 102 F. Supp. 597 (1952); *U. S.* v. *Fitzpatrick*, 96 F. Supp. 491 (1951); *Marcello* v. *U. S.*, 196 F. 2nd 437 (1952); *Townsend* v. *U. S.*, 95 F. 2nd 352 (1938).

In those specific cases involving abuses of witnesses or methods amounting to a denial of due process of law or of equal protection of the laws there is ample basis for invalidation on specific grounds in specific cases. No abuse of method nor villification of Sweezy took place here. This was not a roving inquiry into beliefs and associations, nor a Roman Holiday with the witness. Even the questions concerning "socialism" were directly related to what the witness meant by use of the word in light of his testi-

mony that the kind of "socialism" he advocated existed "only in Communist countries today." (R. 42) It was because of such testimony that the witness was asked at the second hearing whether as a part of his lecture at the University of New Hampshire he told the students that "socialism" was inevitable in this country. If attainment of "socialism" as Sweezy uses the word included an objective of a Communist America the relevancy of such questioning is apparent. Calling a dog a cat cannot make it a cat. Was it advocacy or was it discussion?

If the transcripts are read carefully it will be seen that the witness was treated courteously, the questions were asked privately, and all in a proceeding subject to careful Rules of Procedure (Appendix E). The questions have been found to be relevant, the statutes constitutional under the laws of the State of New Hampshire, and it is respectfully submitted that this decision of the Highest Court of the State of New Hampshire should be affirmed. As the New Hampshire Supreme Court so aptly said (R. 22):

> "The restrictions upon the defendant's freedoms with which we are here concerned result from the investigation authorized by the Legislature and not from legislation directly limiting those freedoms, such as was considered in *Nelson* v. *Wyman*, 99 N. H. 33, 49, 50. 'There is a vast difference between the necessities for inquiry and the necessities for action. The latter may be only when danger is clear and present but the former is when danger is reasonably represented as potential.' *Barsky* v. *United States*, 167 F. (2d) 241, 247."

> "The problem of determining whether the threat of subversive activities in this state was sufficiently great to require an investigation and the consequent limitation upon civil liberties was resolved by the Legislature. Its adoption of the resolution authorizing the investigation was its judgment that the danger to existing government posed by subversive activities is potential. We have not changed our views of the Legislature's right to reach that judgment since our opinion

in the *Nelson* case in which we upheld the Legislature's decision to inquire of residents concerning activities aimed at the overthrow of government by force and violence, whenever they occurred. Id., 42. The limits of the investigation are subject to control by the Trial Court and therefore should offer no opportunity for any official to prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion as claimed by the defendant, nor permit the exposure of witnesses to unfavorable publicity for the mere sake of exposure." *Wyman* v. *Sweezy*, 100 N. H. 103, 114.

ARGUMENT

I. FACT-FINDING INVESTIGATION OF SUBVERSIVE ACTIVITIES BY STATE LEGISLATURES IS NOT PRECLUDED BY Pennsylvania v. Nelson, 350 U. S. 497, 100 L. Ed. 640 (1956).

The decision of this Court in *Pennsylvania* v. *Nelson*, *supra*, expressly confined itself to a holding that the Federal *Smith Act* ". . . supersedes the enforceability of the Pennsylvania Sedition Act which proscribes the same conduct." The conduct proscribed was the knowing advocacy of the overthrow of the government of the United States by force and violence. Nowhere in the decision of this cause was there even a hint by dicta that provisions of State statutes making criminal the knowing advocacy of the overthrow of the States were superceded. In fact, the majority in *Pennsylvania* v. *Nelson*, *supra*, were careful to explicitly state:

> "The precise holding of the Court and all that is before us for review is that the Smith Act of 1940 as amended in 1948 which prohibits the knowing advocacy of the overthrow of the government of the United States by force and violence supersedes the enforceability of the Pennsylvania Sedition Act which proscribes the same conduct."

The reasons assigned by the majority in support of this decision included recognition that the pattern of regulation evidenced

congressional intention to occupy the field of sedition *against the United States*. This Court quoted with approval a portion of the decision of the Pennsylvania Supreme Court to the effect that sedition *against the United States* is not a local offense but it is a crime against the nation and should be prosecuted and punished in the Federal Courts. Finally, the majority concluded that criminal prosecution and enforcement of State laws making it a crime to commit sedition *against the United States* involved a serious danger of conflict with the administration of the Federal program.

None of these reasons are applicable either in logic or law to State statutes making it a crime to seek the overthrow of the *State* government by force and violence. The New Hampshire Subversive Activities Law (RSA 588) on which the resolution authorizing the legislative fact-finding investigation involved in the principal case was based, makes it a crime in New Hampshire to commit sedition against the government of the United States *or* the government of the State of New Hampshire. This statute is subject to separability by express provision. The decision in *Pennsylvania* v. *Nelson* merely "suspended the enforceability" of that separable part of the Subversive Activities Law of New Hampshire proscribing sedition against the government of the United States—it remains a crime in New Hampshire to commit sedition against the State of New Hampshire. Furthermore, the suspension of enforceability which itself was the language of the majority in *Pennsylvania* v. *Nelson*, was specifically limited to continue only for such a period of time as the Smith Act remains Federal law.

Nowhere in the Federal Constitution can there be found authority in Congress to take from the States their reserved police powers under the Tenth Amendment to the Federal Constitution to make it a crime to seek to overthrow their own governments. It was strongly urged before this Court in the argument in *Pennsylvania* v. *Nelson* and in the Petition for Rehearing filed on April 25, 1956, that it is almost impossible to conceive of sedition or subversion against the United States that is not also unavoidably directed against the State in which the sedition

occurs. Subversive activities designed to overthrow the Federal Government by force and violence are themselves an immediate danger to the safety and constitutional security of each of the States. Beyond certain isolated locations of exclusive federal jurisdiction, such criminal activity must take place within the confines and jurisdiction of a State. In this the States are vitally concerned, particularly in view of the notorious objective of International Communism which aims at the destruction of the *capitalist system* by force and violence if necessary. Such subversive objective is not confined to any particular form of capitalist government, State or Federal.

That there is and has been local seditious activity in which local governments have been threatened by subversion or sedition against the State itself, however the proposition may be phrased, is historical fact. *Shay's Rebellion*; "A Little Rebellion" by Marion L. Starkey, published by Alfred A. Knopf (1955); "History of Exeter, New Hampshire" by C. H. Bell, published by Farwell Co. of Boston (1888) pgs. 96-99.

It is within the constitutional reserved power of the State to make it a crime within its borders to seek to destroy itself by force and violence or other unlawful means. In this connection, the States surely cannot reasonably be denied the power to investigate by fact-finding committee to seek to determine whether subversive persons or subversive activities are existent within the State and whether any new State laws are necessary in regulation thereof.

As the Department of Justice respectfully advised this Court by brief and oral argument in *Pennsylvania* v. *Nelson*, 350 U. S. 497 (1956) the States have been and can be of material help in dealing with this problem, which is common to all States as well as to the Federal Government. It is believed to be of vital importance to observe in this regard that the Federal Bureau of Investigation does not have the power to subpoena witnesses or to take testimony under oath. Furthermore, it has but a limited number of agents—some 6,200 at this writing—who are literally swamped with the responsibility of investigating multitudes of violations of the Federal law ranging from kidnapping through

armed robbery to interstate transportation of stolen vehicles to subversion against the Federal Government. The Federal Government and the F.B.I. need, should have, and are entitled to intelligent, effective partnership with State investigating agencies. The proposition does not need restatement that distinguishment between dissent and actual subversion is a complicated procedure requiring testimony under oath in the interests of probity. It is simply impossible to find the true facts in determining whether there has been subversion without requiring reluctant witnesses to testify under oath subject to penalties of perjury.

The decision in *Pennsylvania* v. *Nelson*, *supra*, should not now be broadened to include supersession of state proscription of subversive activities directed against the State governments, lest irreparable damage be done to intelligent, reasonable and conservative efforts of fact-finding agencies in the State and Federal Governments to keep abreast of the extent of subversive penetration of this nation from coast to coast. The States should not be left helpless to deal with sedition against themselves dependent entirely upon Federal investigation. Committees of the Congress operating in this field are materially limited in number and personnel. To require that the decision whether to prosecute for attempts to overthrow the State government by force and violence or unlawful means should be confined to Federal authority would be not only an unreasonable interpretation of the Tenth Amendment but would render the States helpless to deal with incipient subversive activities to the detriment of the entire country.

As was said by the American Bar Association in its brief in the case of *Communist Party of the United States of America* v. *Subversive Activities Control Board*, (No. 48, October Term 1955) and again in its brief in *Watkins* v. *United States*, (No. 261, October Term 1956):

> ". . . this country is entitled to protection—not alibis or epitaphs."

The States are equally and vitally concerned with the Federal Government in detecting unlawful attempts either to overthrow

their own government or the government of the United States. That this is true does not require documentation. Nothing in this urgently important field would be of greater benefit to Federal-State partnership in intelligently and constitutionally dealing with this continuing problem than for this Highest Court in the world to review the full impact of the decision in *Pennsylvania* v. *Nelson*, 350 U. S. 497, so as to permit this country to deal with subversive activities on a nation-wide basis of continuing restrained investigation with the Federal and State governments operating in close liaison as partners.

II. NEW HAMPSHIRE LAW AS CONSTRUED BY THE NEW HAMPSHIRE SUPREME COURT IN THE PRINCIPAL CASE DOES NOT VIOLATE THE FIRST AMENDMENT TO THE FEDERAL CONSTITUTION.

In its opinion in *Wyman* v. *Sweezy* (R. 210), the Supreme Court of New Hampshire expressly considered and adversely disposed of Appellant's contentions that the questions put to him violated the State Constitution and the First and Fourteenth Amendments to the Federal Constitution. Appellant at no time claimed the privilege against self-incrimination. No question of the Federal Fifth Amendment or its State counterpart (contained in Part First, Article 15 of the New Hampshire Constitution) is here involved. This is solely and distinctly what has come to be popularly referred to as a "First Amendment Case."

Appellant contended before the Highest Court of New Hampshire that asking him questions relating to the actual content of a lecture given by him at a State University violated the Federal First Amendment that no law may constitutionally abridge freedom of speech. In holding that the questioning did not violate the First Amendment, the New Hampshire Supreme Court quoted with approval from *Barsky* v. *United States*, 167 F. 2d 241, 247, to the effect that:

> "'There is a vast difference between the necessities for inquiry and the necessities for action. The latter may be

> only where danger is clear and present but the former is when danger is reasonably represented as potential.'" (R. 221).

It was plainly pointed out that such restrictions on Appellant's freedoms, if any, as were in issue before the Supreme Court of New Hampshire resulted from investigation and not from any legislation directly limiting those freedoms. Thus there has been no attempt in New Hampshire nor is there anything in the record of this case designed to empower or constitute a legislative committee as a censor or regulator of human conduct. This was solely a fact-finding investigation and nothing in the questioning directed toward the witness directly or indirectly enjoined any conformity upon the witness nor compelled the witness in any way, shape or manner to be a witness against himself.

In point of fact, the witness told the Legislature of New Hampshire that he was prepared to answer certain questions but beyond that he was not talking. The witness then proceeded to make a categorical denial of participation in subversion. His language on this point appears in the Record at page 70, where he said:

> "I would like to say one thing in this connection, Mr. Wyman. I stated under oath at my last appearance that, and I now repeat it, that I do not advocate or in any way further the aim of overthrowing constitutional government by force and violence. I did not so advocate in the lecture I gave at the University of New Hampshire. In fact, I have never at any time so advocated in a lecture anywhere. Aside from that I have nothing I want to say about the lecture in question. . . . on the grounds that it is totally outside the scope of this inquiry and that it is an invasion of constitutional rights of free speech guaranteed under the First Amendment."

The witness then proceeded to refuse to answer even the general question as to what was the subject of his lecture. (R. 70)

Appellant's brief seeks to convey the impression that fact-finding investigation directed to determining what the witness

actually said, in an effort to ascertain whether or not there had been any subversive activity as defined in the basic statute (RSA 588) was a hateful inquisition, invasive of academic freedom, restricting and suppressing freedom of speech and discouraging persons from attendance. At this point it is believed to be quite material to consideration of this matter to observe that the lecture involved was given to students *required* to attend it for the purpose of obtaining academic credit in the Humanities Course at the University of New Hampshire. The matter thus stands on a very different footing from a public address which citizens would be free to attend or not to attend as they saw fit. This observation should not be taken as indicating that Appellee believes that in the latter event a fact-finding investigation would be for that reason precluded, for as this Court has said in *Adler* v. *Board of Education*, 342 U. S. 485, 493:

> ". . . A teacher works in a sensitive area in a classroom. There he shapes the attitude of young minds toward the society in which they live. In this the State has a vital concern. It must preserve the integrity of the schools."

The New Hampshire Supreme Court specifically limited the Trial Court's ruling that fact-finding into the actual content of any lecture given at any school was permitted in New Hampshire as incorrect standing alone and without qualification (R. 216), holding that those lectures about which the committee may inquire are confined to those concerning which it possesses reasonable or reliable information indicating that the violent overthrow of existing government may have been advocated or taught whether knowingly or wilfully or not. The decision cautioned that the legislative precept did not authorize the committee to examine private citizens indiscriminately in the mere hope of stumbling on to information.

The record in the principal case indicates more than sufficient basis for questioning Paul M. Sweezy to determine whether he was a party to advocacy of subversion. In the Record appears a reference to more than a half dozen organizations with which the witness had been affiliated either as a member, sponsor, or

proponent, which organizations for purposes of the Federal Loyalty-Security Program had been cited by the Attorney General of the United States as Communist-infiltrated or controlled. Of course, such descriptions by federal authorities did not make the organizations "subversive" within the definition of New Hampshire Law. But they at the least afforded some indication that Communists were active within them. What did the witness know about all this? Some of these and other organizations with which the record indicates the witness to have had more than passing acquaintance, have been described in reports of the House Committee on Un-American Activities as also Communist controlled or manipulated. These reports had been widely publicized and it is most unlikely that such publication was not then well known to the witness. In addition to this, the witness himself testified that he was a Marxist (R. 82) and that he had written, with one Leo Huberman, the following statement in 1953 which he reaffirmed as expressing his continuing opinion at the second hearing in 1954. (R. 108)

> "In which country, within the last few months, did a presidential candidate promise peace and immediately upon taking office set about spreading war? . . .
>
> "And as regards the leaders of the two camps, it is certain that in the last eight years the United States has been responsible for killing a vastly greater number of human beings than has the Soviet Union.
>
> "We would not argue, however, that the quantitative question, even if it were possible to answer it with precision, is the crucial one. In the last analysis, those who hate violence must judge it by an entirely different standard—they must ask whether violence is used to perpetuate a state of affairs in which violence is inevitable, or whether it is used in the interests of creating a truly human society from which it will be possible at long last to banish violence altogether.
>
> "So far as the United States and its allies are concerned, There is unfortunately no doubt about the answer. Our

Country is preparing to practice violence on a hitherto undreamed-of scale to preserve a social order which in the space of four decades has already produced the greatest orgy of violence in the whole long and violent history of the human race. Capitalism, the organization of society according to the barbaric principle of private profit, is the scourge of mankind; and violence designed to preserve it is doubly damned, once for itself and once for its purpose.

"Those of us who have socialism in our bones, who believe that a truly human society can be erected only on the basis of common ownership and economic planning, must necessarily judge the violence of the socialist countries differently. We hate it, as we hate all violence; we would have vastly preferred to have the building of the new economy take place peacefully and painlessly, as it could have if the advanced countries had led the way. But history—which, as Friedrich Engels once said, is a most cruel goddess—decreed that the economic foundations of the society of the future must be laid in backward countries, not only without the assistance of the advanced countries but against their ruthless and implacable resistance. It was thereby rendered inevitable that the process should be difficult, painful, and violent. But the process does go forward, and that the majestic successes of the Soviet economy, despite all the strains and trials to which it has been subjected in these years of Hot and Cold Wars, is irrefutable proof, and the hopes of mankind for a better future go with it. For the first time in history we can say that violence is being used to protect regimes which are doing their utmost to create a society which will be able to dispense with violence. That makes all the difference."

Even the brief of Appellant concedes that this extract from Appellant's writings might be a justification for pursuing further with the subject matter of his lecture (Appellant's Brief p. 35). In this connection it is important to observe that the New Hampshire Supreme Court in its opinion found the questions to be

pertinent and relevant, which holding is believed to conclude the matter of relevancy, which is not open here.

"Interpretation of state legislation is primarily the function of state authorities, judicial and administrative. The construction given to a state statute by the state courts is binding upon federal courts." *Albertson* v. *Millard*, 345 U. S. 242, 97 L. Ed. 983 (1953).

Poulos v. *State*, 97 N. H. 352, 88 A. 2d 860, Affd. 345 U. S. 395, 97 L. Ed. 1105 (1952);

Winters v. *New York*, 333 U. S. 507, 92 L. Ed. 840 (1948);

Palerno v. *Lyons*, 334 U. S. 314, 92 L. Ed. 1409 (1948);

Aero Mayflower Transit Co. v. *Railroad Comm'rs.*, 332 U. S. 495, 92 L. Ed. 99 (1947);

Bob-Lo Excursion Co. v. *Michigan*, 333 U. S. 28, 92 L. Ed. 455 (1947);

Standard Oil Co. v. *Johnson*, 316 U. S. 481, 86 L. Ed. 1611 (1942);

U. S. v. *Texas*, 314 U. S. 480, 86 L. Ed. 356 (1941);

Minnesota ex rel Pearson v. *Probate Ct.*, 309 U. S. 270, 84 L. Ed. 744, (1940);

Erie v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188 (1937).

See also: *The Leiter Minerals, Inc.* v. *United States*, (USSC A/S, Jan. 14, 1957, p. 9)

See: *Annotations*, 50 *Am. Jur.* "Statutes" s. 223
14 *Am. Jur.* "Courts" ss. 99-114
114 A.L.R. 1500

Faced with this record of Sweezy's activities and writings, it is respectfully contended that any fact-finding committee charged with seeking to determine whether or not subversive activities existed in New Hampshire would have been derelict in its duty had it not called Sweezy to testify. For such a committee to be met merely with a general denial and refusal to answer further even concerning the subject of his lecture, on contention that the

First Amendment precludes such questioning, proselytes the First Amendment to purposes for which it surely was never intended. The First Amendment does and should mean that laws under our constitutional system may not prohibit freedom of speech except in those cases where freedom of absolute expression is conscionably restricted in the public interest.

See: *Dennis* v. *United States*, 341 U. S. 494 (1951);

American Communications Assoc. v. *Dowds*, 339 U. S. 382 (1950);

United States v. *Orman*, 207 F. 2d 148 (1953);

Rumely v. *United States*, 345 U. S. 41 (1953);

United States v. *Josephson* 165 F. 2d 82 (1947); Cert. Denied, 333 U. S. 838 (1948);

Lawson v. *United States*, 85 U. S. App. D. C. 167, 176 F. 2d 49; Cert. Denied, 339 U. S. 934 (1949).

"Now, whatever may have been thought to have been the effect of the First Amendment, right of a Congressional Committee to make inquiries relating to the activities, affiliations and associations of witnesses, in the light of the Josephson case, in the Second Circuit, and the Barsky case in our own Circuit, there can be no possible question in these two jurisdictions, if indeed there can be in any other, that the First Amendment does not preclude the Committee from asking the questions here involved, nor does it justify the defendant in refusing to answer them." *United States* v. *Fitzpatrick*, 96 F. Supp. 491, 493 (1951).

If the First Amendment is to be held to prohibit the asking of an admittedly relevant question in a lawful and constitutional investigation of subversive activities, there is thereby injected a road block to essential legislative process which would certainly stifle the imperative need that lawmaking bodies should be entitled to ascertainment of full and factual background information in order to intelligently legislate.

McGrain v. *Daugherty*, 273 U. S. 135, 161 (1927);
In re Chapman, 166 U. S. 661, 670 (1897);
Townsend v. *United States*, 95 F. 2d 352, 355 (CADC 1938), Cert. Denied 303 U. S. 664;
Barenblatt v. *United States* (#13327, CADC Jan. 3, 1957);
Watkins v. *United States*, 233 F. 2d 681 (1956).

In Appellant's brief at page 38, third paragraph, in remarks seeking adoption of a rule to limit legislative cross-examination in ascertainment of facts, Appellant urges that a prosecution for perjury is an adequate device for achieving truth and assuring "the integrity of the process of legislative investigation." If such a position were to be the law it would be within the power of any witness to foreclose his further examination solely by affirmation under oath in the nature of a blanket denial of relationship to or knowledge of the subject matter under investigation. The law of perjury is itself a difficult field. Much investigation of possible subversion is unavoidably related to answers involving a subjective standard, *e. g.* "I don't remember," "I never knew," "I know of no subversion," etc. No fact-finding committee, State or Federal, could get anywhere near the facts were it to be shut off by an answer from the witness under oath that, "I am not and have never been a Communist. I know nothing of nor ever have known of any persons or organizations seeking the overthrow of the State by force and violence if necessary. Beyond that I am not talking."

A point is reached in legislative investigation as well as in judicial proceedings where no matter how polite the exchange, the matter becomes vitally adversary. It is evident that the record now before this Court reflects courteous examination and courteous answers. No known abuse of method or procedure exists here and none is claimed by Appellant. Nevertheless, Appellant's refusal to testify before the New Hampshire Superior Court has resulted in a finding of contempt of court. It was a deliberate refusal. It was an intentional denial of legislative power. It was from a witness represented by counsel, who now

seeks from this Court a decision applying the *First Amendment* in a broader manner than even the *Fifth Amendment* has yet been treated in our courts.

See: *Quinn* v. *United States* 349 U. S. 155 (1955)
Rogers v. *United States* 340 U. S. 367 (1951)

No harassment can be found in this record. The second inquiry of the witness was literally compelled by the witness' own previous activities. While it is something of a restriction that a person should be required to testify before a legislative committee, nothing in the process of asking questions in private session restrains the witness from freedom of lawful speech or writing in any known way. *U. S.* v. *Fitzpatrick*, 96 F. Supp. 491 (1951); *U. S.* v. *Bryan*, 72 F. Supp. 58 (1947); *Marshall* v. *U. S.* 176 F. 2nd 473 (1949). The lives of every citizen of a State and of the United States as well, must, subject always to the privilege against self-incrimination, remain an open book in relation to inquiry of subversion against State or Nation. Such a duty in this troubled era is a reasonable responsibility of American citizenship. Should abuses in method or procedure violate other private rights, such abuses may be corrected by appropriate judicial review. But appeals to the judiciary should be confined to claims of specific abuse and not seek aid from the judiciary in so limiting the powers of a State Legislature or of Congress as to literally make it impossible for it to do its assigned and important task under our tri-partite system of government.

III. QUESTIONS CONCERNING THE PROGESSIVE PARTY AND THE PROGRESSIVE CITIZENS OF AMERICA WERE NOT IN VIOLATION OF THE FIRST AMENDMENT.

One of the duties of the legislative committee under its precept in the principal case (L. 1953, c. 307) was to determine whether or not any subversive organizations existed in the State of New Hampshire. RSA 588 defines "subversive organization" as:

". . . any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of New Hampshire, or of any political subdivision of either of them, by force, or violence."

Closely related to the questioning of Sweezy was questioning of one Gwynne H. Daggett, a professor at the University of New Hampshire, who extended the invitation of Sweezy to give the lecture on March 22, 1954. (R. 71) Considerable of the Record and the exchanges of counsel appearing on Pages 96 - 151 were concerned directly with the refusal of Professor Daggett to testify concerning the lecture and his relationship to the Progressive Party. Eventually the Superior Court of New Hampshire found the questions relevant and ordered Daggett to answer, at which time Daggett complied, testifying in part that he was a Vice-Chairman of the Progressive Party in New Hampshire at the present time and that the party had an informal organization but was largely moribund. (T. 220, l. 40) In New Hampshire, as the Record shows, the forerunner of the Progressive Party was believed to be, based on investigation, an organization known as the Progressive Citizens of America (R. 37, 64) This organization became active in 1947 and it was in relation to the incipiency of the Progressive Citizens of America that Sweezy was questioned concerning the names of individuals working in that organization. (R. 64) It is not believed that a fact-finding committee is or should be required to first identify individuals as Communists before it can question a witness concerning them. One of the persons about whom the witness was asked in this regard was one Charles Beebe (R. 64). A portion of a previous record under oath was read to Sweezy in which the question was asked of another witness, "Is it your opinion that the Communists were active in the Progressive Party?" Answer: "Yes, it was." (R. 98) Sweezy was then asked pointedly whether Com-

munists were active in the Progressive Citizens of America and refused to answer. (R. 98) At one point the committee asked, "If I told you that I had sworn testimony by Mr. Charles Beebe that he was then [in 1947] a member of the Communist Party, would that surprise you?" To which the witness' reply was, "Surprise me? I don't know. Are you telling me that you have?" (R. 65, 66) In the combined transcripts appeared reference to a letterhead of the Progressive Party in New Hampshire containing the names of not less than five individuals identified by sworn testimony in the same State investigation as present or former members of the Communist Party. (See Transcript, p. 189, l. 25 and p. 191, l. 25).

It would be impossible for the committee to ascertain the extent and influence of Communists in the Progressive Citizens of America and later in the Progressive Party itself or ultimately whether either of these organizations in New Hampshire were "subversive organizations" within the definition of RSA 588 unless witnesses are required to testify concerning the activity of named persons in these organizations. Nothing in the questions required Sweezy to himself characterize persons as Communists. The witness testified repeatedly that he did not know persons as Communists and did not inquire into their "political" affiliations. In disposing of this point the New Hampshire Supreme Court specifically found that the Committee was entitled to inquire and that it—

> ". . . did possess information which was sufficient to reasonably warrant inquiry concerning the Progressive Party . . . evident from his statement made during the hearings held before him that 'considerable sworn testimony has been given in this investigation to the effect that the Progressive Party in New Hampshire has been heavily infiltrated by members of the Communist Party and that the policies and purposes of the Progressive Party have been directly influenced by members of the Communist Party'. See: *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 209" (R. 218).

The New Hampshire Supreme Court emphasized in the Sweezy decision that such questioning is necessarily relevant, saying:

> "The policies of an organization are established by its members, or sometimes by a small minority of its members. Information as to policies may be obtained in some instances from those members who have participated in the making of them. On the other hand, if subversive purposes actually exist, the witness may not fully disclose his knowledge concerning them and other methods must be used to determine their existence. *The extent to which members of the Communist Party are incuded in the membership of an organization and are active in controlling its policies is clearly related to the question of whether the organization is subversive.* A person who has been active in an organization, as was the defendant in the Progressive Party, is a natural source from which the committee may acquire information concerning the purposes of the organization or the identity of those members who established them.
>
> "It is on information of this sort that a determination concerning the nature of an organization may be made by a legislative investigating committee. Whether the persons referred to in the questions were or were not in fact Communist Party members or subversive persons is not decisive of the issue of relevancy and the defendant was not entitled to proof of that fact before being required to answer. The questions called for answers concerning the membership or participation of named persons in the Progressive Party which, if given, would aid the Attorney General in determining whether that party and its predecessor are or were subversive organizations. They were accordingly relevant to the subject matter of the investigation." (R. 218, 219). (Emphasis Supplied)

United States v. *Petrillo*, 332 U. S. 1 (1947);

Dunne v. *United States*, 138 F. 2d 137, Cert. Denied 320 U. S. 790, 88 L. Ed. 476 (1943);

Lawson v. *United States*, 176 F. 2d 49. Cert. Denied 339 U. S. 934 (1949)

IV. THE CONSTRUCTION PLACED ON THE NEW HAMPSHIRE STATUTES BY THE NEW HAMPSHIRE SUPREME COURT DOES NOT DENY DUE PROCESS OF LAW.

Appellee is completely at a loss to understand—other than for physchological reasons—why Appellant continues to seek to confuse standards of "guilt" with investigation of fact. At page 55 of his brief, Appellant refers to the difficulty of ascertaining "where this new standard of guilt would draw the line between the allowable and forbidden . . ." Appellant seeks to liken his position as a witness before the investigating committee to that of a defendant on trial in a court of law. While he recognizes that no criminal prosecution is involved, again and again he speaks of the "sanctions of the investigatory process" (Brief, page 55), and attempts to imply that in some manner something that is his right has been taken away from him through having been questioned by the committee. On the record in this case it is entirely apparent that no sanctions have been directed to Appellant whatever. Because of Appellant's refusal to answer questions it was necessary under New Hampshire Law (RSA 491: 19, 20) to file a petition with the Superior Court to have the matter continued in court. The transfer to the court was certainly a situation of Appellant's own creation and once in court he was then subject to the judicial power and to the protection of the judicial process. Appellant was convicted of contempt of court, not contempt of a legislative committee. Appellant was never found to be in contempt of a legislative committee. (R. 208)

At no time did the committee seek to tell the witness what to say or what not to say. At no time did the committee release to the press the transcript of Sweezy's testimony. In the course of the judicial proceedings and in fact at the request of Sweezy's counsel as well as by direction of the court, the transcripts of the January and June hearings became a part of the court record and hence a public document.

That portion of the opinion of the New Hampshire Supreme Court relative to legislative definition of members of subversive organizations as subversive persons although not "knowingly or wilfully" attaches no criminal sanctions to the classification. (R. 218). See *Nelson* v. *Wyman* 99 N. H. 33, (1954). Appellant's attempt to invoke *Wieman* v. *Updegraff*, 344 U. S. 183, is inapt. The Wieman case involved a loyalty oath to which criminal sanctions applied even though the statute did not require scienter for criminality. For purposes of fact-finding investigation, the New Hampshire Legislature directed its committee not only to ascertain whether there were subversive organizations in the state within the meaning of the statute, but *a fortiori* the nature and extent of the membership therein. Clearly, membership in an organization actually subversive in the precise formula established by RSA 588 might include individuals who did not know of the real purposes of the organization. Such membership is required to be investigated but no criminal sanction applies to innocent membership. It is not made a crime in New Hampshire to be a member of even a subversive organization unless the membership is knowing and wilful. (RSA 588). The Supreme Court of New Hampshire has not said more than this. The law involved in the principal case did not render innocent membership subject to criminal penalties. As was explicitly stated in *Nelson* v. *Wyman*, 99 N. H. 33, 48 (1954) ". ... Those who lack that knowledge do not violate the statute by their membership". Under the Oklahoma statute involved in the *Wieman* case, membership of an innocent character in an organization later found to be subversive might have rendered an affiant subject to criminal penalties. Nothing of this type is very remotely involved in the principal case. There is and has been no "indiscriminate classification of innocent with knowing activity" by the New Hampshire law as construed by the New Hampshire Supreme Court in the principal case.

> "The statute does not penalize members unless it appears beyond a reasonable doubt that they became or remained such knowing said organization to be a subversive organiza-

tion. If they have that knowledge, which must be knowledge of its unlawful activity or purpose (see *Bridges* v. *Wixon*, 326 U. S. 135; *De Jonge* v. *Oregon*, 229 U. S. 353), they are adding their weight to the accomplishment of the forbidden purpose or activity whether actually approved by them or not. *Dunne* v. *United States*, 138 F. (2d) 137, 143, cert. den., 320 U. S. 790. An organization may be found to be subversive only if the evidence indicates beyond a reasonable doubt that its activities or purposes are those which are plainly defined in the statute. Persons who may be subject to the statute are clearly informed that if they join or continue membership in an organization which engages in those definitely described activities or which has those purposes that classify it as subversive, knowing that such are its activities or purposes, they are liable to its penalties. *Whitney* v. *California*, 274 U. S. 357, 368. The fact that the knowledge on the part of the accused which is an essential element of the crime is concerned with the thought processes of the accused and is not capable of direct proof by objective evidence does not invalidate the statute. The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence. *Dennis* v. *United States*, 341 U. S. 494, 500." *Nelson* v. *Wyman*, 99 N. H. 33, 47 (1954).

Sweezy testified that he considered himself a Marxist. While Appellee is decidedly not an expert in the field of Marxism, there is considerable writing on this subject in relation to Communism and in direct relation to subversive activity as defined in the New Hampshire statute. The basis of Communist theory was laid down by Marx and Engels in the *Manifesto* in 1848. Certain types of Marxism clearly embrace advocacy of the overthrow of the capitalist system by force and violence if necessary. For a carefuly study of this subject, see the development of Marxist theory as contained in Hunt, "The Theory and Practice of Communism" (New Ed. New York, the MacMillan Co., 1952). As has been stated by this author at page 70:

> "... Marx's followers early became divided into two schools, each of which could appeal to his authority—the moderates, who believed in peaceful revolution, which came, in fact, to imply the possibility of reforming the existing order, and the extremists, who argued with perhaps a greater show of reason, that violence would be necessary, since capitalists were wicked animals who would defend themselves if attacked. But present-day Marxists, following Lenin, vehemently deny that Marx ever modified the position he took up in the *Communist Manifesto*, and assert that the fact such an opinion gained credence towards the end of the last century was due to the "opportunism" of the Social Democrats."

When a legislative committee is charged with a responsibility of finding out whether individuals in a State seek to subvert youth in a State-supported institution at a lecture at which attendance is required, testimony of an individual that he considers himself a Marxist raises a whole galaxy of necessary relevant questioning. None of this questioning, in the language of Mr. Justice Black in his concurring opinion in *Wieman* v. *Updegraff* 344 U. S. 183 (1952) stigmatizes or penalizes thought or speech of the mere unorthodox nor ensnares or silences full and free lawful expression of ideas. Who brought this Marxist to the State University? What kind of Marxist was he? What did he use and say to the students who were required to listen to him? Were there organizations within the State reported to be Communist-controlled included within the membership or acquaintance of this person? If so, were such organizations subversive as defined by the State law? Did they propose the overthrow or alteration of our constitutional form of government by force and violence if necessary? Was there advocacy of subversion or was the lecture merely objective, explanatory, teaching? If there was no subversion, why does the witness decline to answer courteous questioning of a legislative committee in executive session? Is the position of the witness tantamount to contention that the classroom is something supra State? In this day and

time and with the background of world affairs what it is, is not investigation of the activities of an admitted Marxist relevant and in fact obligatory upon a committee charged with the duty to report whether there has been subversion in a State?

Even the most extreme advocates of academic freedom do not contend that a legislative committee is powerless to ask pertinent questions about what goes on in the classroom.

> "That Congress and State Legislatures have broad and extensive powers of investigation is no longer open to serious doubt. While it was questioned at one time whether Congress could act as the grand inquest of the nation (*Kilbourn* v. *Thompson*, 103 U. S. 168) *that view is not now law.*" *Opinion of the Justices*, 96 N. H. 530 (1950). Emphasis supplied).
>
> See also: *Marcello* v. *United States*, 196 F. 2d 437 (1952); *United States* v. *DiCarlo*, 102 F. Supp. 597 (1952).
>
> "It is not always easy to distinguish teaching or advocacy in the sense of incitement from teaching or advocacy in the sense of exposition or explanation. *Dennis* v. *United States*, 341 U. S. 494, 572. The distinction is one of fact. The defendant's denial that he advocated, taught or in any way furthered the aim of overthrowing constitutional government by force or violence in his lecture is simply his determination of that fact, which the committee could believe or not as it saw fit. The witness could not by his answer impose upon the investigating committee the burden of producing evidence that a doctrine aimed at the violent overthrow of existing government was in fact advocated by him before it could inquire of him concerning the lecture." *Wyman* v. *Sweezy*, 100 N. H. 103, 108, 121 A. 2d 783 (dec'd Mar. 6, 1956).

V. THE POWER OF A FACT-FINDING COMMITTEE OF A STATE LEGISLATURE TO INQUIRE INTO THE ACTUAL CONDUCT OF A REQUIRED ATTENDANCE LECTURE AT A STATE-SUPPORTED INSTITUTION FOR THE SOLE PURPOSE OF DETERMINING WHETHER THE LECTURE INCLUDED ADVOCACY OF SUBVERSIVE DOCTRINE AS DISTINCT FROM OBJECTIVE EXPLANATION IS A BASIC SECURITY RIGHT WELL WITHIN THE POWER OF A STATE.

Such questioning cannot possibly either terrorize intelligent yet independent professors nor enjoin conformity on the classroom. The need for explanation becomes aggravated with such writings as those reaffirmed by Sweezy (R. 108), where in substance it was written that a President of the United States immediately upon taking office set about spreading war; that the United States in the last eight years has been responsible for killing a vastly greater number of human beings than the Soviet Union; that violence to perpetuate capitalism is doubly damned whereas violence used in the interests of creating a truly human society stands on a different footing; that the majestic successes of the Soviet economy are proof of its advance against implacable resistance of the advanced countries (meaning the United States) with the hopes of mankind having a better future going with it, and concluding that "For the first time in history we can say that violence is being used to protect regimes which are doing their utmost to create a society which will be able to dispose with violence. That makes all the difference." (R. 83).

Was this kind of violence by indirection advocated to the students at our State University? The witness may explain but he may not refuse to answer. Nothing in the mere asking of the questions operates as a police state nor as an unwarranted constitutional invasion of the witness' right of privacy. Those who contend that there is a modern day reign of terror amongst free men fed by unwarranted conclusions of guilt by association, overlook entirely the fundamental social—and for that matter,

factual—inference that the company a man keeps is relevant to his personal equation and to the meaning of his activities.

See: Shipley, *Guilt by Association*, D. C. Bar Journal of January 1954, page 16.

An isolated, well-intentioned, bona-fide mistaken membership in a single subversive or communist-controlled organization in support of one or more of the purposes of the organization which may be entirely legal and laudable is probably colorless on issue of subversive activity and may readily be explained. However, when a person's associations with cited subversive organizations over the years have been extensive, repeated, continuing, and vociferously active, then the record of the associations warrants a different view of the meaning of these extensive associations. Perhaps the individual is just one of the radical dissenters who joins and works with these organizations because he or she finds it difficult to accept a view from any Attorney General or any legislature. Or perhaps out of a spirit of genuine concern the individual has been active with such organizations trying to divert them away from Communist influence, or perhaps the individual is just too smart to be or have become a member of the Communist Party but his sympathies lie with Communism and he works with these groups who keep the door open to Communism and the Communists but does not actually patently advocate Communism as such. Whichever of these or other conclusions may be drawn, it is up to the witness to explain his conduct because whether the witness likes it or not, such conduct—repeated over the years—*is* equivocal on issues of loyalty to state and nation. Freedom of the inquiring mind to examine fact and theory in perspective is not license to advocate subversive doctrine, nor do any decisions of State or Federal Court so hold, nor is the college campus even in America a privileged sanctuary in which Communists and fellow travelers may propagandize American youth by advocacy of subversive doctrine either in the classroom or off the campus proper. *Adler* v. *Board of Education*, 342 U. S. 485 (1952).

VI. NEITHER NEW HAMPSHIRE LAW, MANNER OF INVESTIGATION, THE QUESTIONS ASKED, NOR THE STATUTE AS CONSTRUED BY THE NEW HAMPSHIRE SUPREME COURT IN THE PRINCIPAL CASE, VIOLATES ANY CONSTITUTIONAL RIGHT OF PAUL M. SWEEZY.

Appellant urges a novel proposition; the nub of which is that this Court should sanction the use of the *First Amendment* as a limitation on investigating authority beyond the requirements of relevancy. None of the cases cited by Appellant in support of these contentions is actually authority for this extreme position. Appellant repeatedly relies on dissenting opinions, particularly by Edgerton, J. in *Barsky* v. *United States*, 167 F. 2d 241 (CADC); Clark, J. in *United States* v. *Josephson*, 165 F. 2d 82 (CA 2nd); and treatises and other tertiary authority derived in part from extreme segment of the teaching profession which is extraordinarily hypochondriacal on the subject of investigation. These citations appear at length at pages 29 and 30 of Appellant's brief, typified by the quotation from Professor MacIver to the effect that legislative committee investigations "have been largely responsible for the spirit of apprehension and the sense of intimidation that, according to considerable agreement of testimony has invaded the halls of learning," MacIver, "*Academic Freedom in Our Time*" (1955), page 49. In addition, Appellant cites as authorities to this Court several publications notorious for their prejudice against investigation, and subsidized by the Fund for the Republic, Inc. Among these are Allan Barth's "*Government by Inquisition*" (1955), and Telford Taylor's "*Grand Inquest*" (1955). (R. 29).

If an investigation is properly conducted, if it operates under Rules of Procedure similar to those adopted in New Hampshire (Appendix E), as recommended by the House of Delegates of the American Bar Association, and as designed to protect the rights of witnesses to the maximum extent consonant with not destroying reasonable fact-finding power; there is no foundation for the claims of hysteria, intimidation, harassment, fear, and

conformity which are quite literally and intentionally presented as a smokescreen designed to make the whole problems of investigation seem to smell to High Heaven. Legislative and congressional investigation is subject to rules of restraint, to requirements of fair method, and to protection of rights of witnesses by many judicial decisions.

U. S. v. *Orman*, 207 F. 2nd 148 (1953).
Barsky v. *U. S.*, 167 F. 2nd 241 (1947);
Matter of Barnes, 204 N. Y. 108 (1911);

The fact-finding power should not be destroyed by any such extreme application of the *First Amendment* as that contended for by Appellant. Nothing that has happened in New Hampshire deprives Appellant of his right to express his lawful views in accordance with democratic procedures nor his hearers of the right to listen. Sweezy has publicly spoken subsequently at divers public places in this State. Lawful free speech has not been shut off in New Hampshire in any way whatever. The web and path of the Communist line in relation to ascertainment of the truth or falsity of denials of subversive activity is a legitimate and necessary part of fact-finding cross-examination. The range of questioning is always subject to the requirement of relevancy.

U. S. Orman, 207 F. 2nd 148 (1953);
U. S. v. *Josephson*, 165 F. 2nd 82 (1947);
Rumely v. *U. S.*, 345 U. S. 41 (1953);
Barenblatt v. *U. S.*, (CCADC Jan. 3, 1957);
McGrain v. *Daugherty*, 273 U. S. 135 (1927);
In re Chapman, 166 U. S. 661 (1897);

See: 33 B. U. Law Review 337 (1953) Liacos, "Rights of Witnesses Before Congressional Committees."

That requirement is always open to judicial review as was done in the principal case. *Wyman* v. *Sweezy*, 100 N. H. 103, 121 A. 2d. 783 (1956).

Again and again, Appellant's argument begs the ultimate question before the legislative committee. Whether discussion

of public issues by methods of peaceful persuasion as distinct from advocacy was in fact involved in the lecture on March 22, 1954 is still unknown. The witness has still refused to testify even concerning the subject of his lecture. Reference to *Dejonge v. Oregon* 299 U. S. 353 at page 48 of Appellant's brief, accompanied by the statement, that laws may not restrict advocacy of ". . . particular points of view or work for particular economic, social or political change *by peaceful and legitimate methods*", again begs the question under investigation, which is whether the advocacy was or was not within the zone of lawful free speech. The statement that appears in Appellant's brief at Page 48 categorically affirming to this Court that "Appellant answered all questions with regard to his activities in these organizations and his knowledge of their activities, so far as the use or advocacy of force and violence was concerned. Appellant also answered all questions concerning the presence of Communist Party members in the two organizations and concerning Communist Party influence or manipulation of any kind . . ." is simply untrue, as careful examination of the Record will indicate. The position of the Committee in this regard was fully outlined to the Superior Court before its ruling was made (R. 120, 124, 129, 132, 133, 135).

In no way does the questioning of the witness seek to punish merely unorthodox *political* opinion, activity or association. The ultimate question which is *still* under investigation and information concerning which the New Hampshire Legislature is entitled to answers, is whether the Appellant's activities were confined to the field of free speech or whether they constituted subversion within the definition of the law. Such information the witness declines to give beyond a general denial. Nothing in the Constitution, nothing in the rules of fair play, nothing in our system of government itself requires or justifies extension of the First Amendment to deny relevant questioning by legislative committees engaged in fact-finding in aid of legislation.

CONCLUSION

Nothing in the record of this case—to borrow Appellant's phraseology—either blocks any lawful public discussion or lawful political organization. Fact-finding investigation is an indispensable foundation of sound legislation. Asking relevant questions under a constitutional resolution preserving at all times the right of any witness to invoke his personal privilege against self-incrimination in no sense suppresses lawful expression of ideas no matter how challenging.

A wide field of possible legislation remains available to State Legislatures in relation to subversive activities involving solely the State government. Based on recommendations of the investigating committee, the New Hampshire Legislature may desire to amend the 1951 Act (RSA 588) to qualify definitions or in regard to other detail; enact laws concerning registration of summer camp guests; change the method of granting immunity and revise the loyalty oath and affidavit.

The interest of State Governments in investigation and protection against subversion directed against the State is undeniable. Even after the decision of this Court in *Pennsylvania* v. *Nelson*, 350 U. S. 497, the States may legislate with respect to subversion involving the Federal Government although the enforceability of such State laws would remain suspended as long as the Smith Act continues as Federal statutory law.

It is earnestly and respectfully submitted that the decision of the New Hampshire Supreme Court should be affirmed.

Respectfully submitted,

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APPENDIX A

Laws of 1951, Chapter 193

AN ACT RELATIVE TO SUBVERSIVE ACTIVITIES.

WHEREAS, there is a World Communist movement under the domination of a foreign power, having as its objective the establishment of totalitarian dictatorship in all parts of the world under its control; and

WHEREAS, such dictatorship is characterized by the liquidation of all political parties other than the Communist Party, the abolishment of free speech, free assembly, and freedom of religion, and is the complete antithesis of the American constitutional form of government; and

WHEREAS, the methods used by such a police state include treachery, deceit, infiltration into governmental and other institutions, espionage, sabotage, terrorism and other unlawful means; and

WHEREAS, the World Communist movement is not a political movement, but is a world-wide conspiracy having sections in each country; and

WHEREAS, using the methods above set forth, it has already successfully conquered in recent years a large part of the world and has established spearheads in this country in the form of various conspiratorial organizations, some masquerading under the pretense of being political parties, others infiltrating organizations which they seek to control in order to futher the objectives of the World Communist movement; and

WHEREAS, the subversive groups have had similar objectives and it is essential to the preservation of the state, as well as for the protection of citizens from unfounded accusations, that criminal acts of a seditious nature be clearly and expressly defined; and

WHEREAS, the methods adopted by subversive persons and organizations render it imperative that the loyalty of persons

entering the public employment of the state of New Hampshire or any of its political subdivisions be definitely established not only for protection of governmental processes but in order to shield employees from unfounded accusations of disloyalty; therefore

Be it enacted by the Senate and House of Representatives in General Court convened:

1. *Subversive Activities.* Amend the Revised Laws by adding after chapter 457 the following new chapter:

APPENDIX B

Chapter 457-A

Subversive Activities

1. Definitions. For the purpose of this chapter "organization" means an organization, corporation, company, partnership, association, trust, foundation, fund, club, society, committee, association, political party, or any group of persons, whether or not incorporated, permanently or temporarily associated together for joint action or advancement of views on any subject or subjects.

"Subversive organization" means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of New Hampshire, or of any political subdivision of either of them, by force, or violence.

"Foreign subversive organization" means any organization directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise, or teach, activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of government of the United States,

or of the state of New Hampshire, or of any political subdivision of either of them, and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization, or individual; but does not and shall not be construed to mean an organization the *bona fide* purpose of which is to promote world peace by alliances or unions with other governments or world federations, unions or governments to be effected through constitutional means.

"Foreign government" means the government of any country or nation other than the government of the United States of America or of one of the states thereof.

"Subversive person" means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches, by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of New Hampshire, or any political subdivision of either of them, by force, or violence; or who is a member of a subversive organization or a foreign subversive organization.

SEDITION

2. Felonies. It shall be a felony for any person knowingly and willfully to

(a) commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of New Hampshire, or any political subdivision of either of them, by force or violence; or

(b) advocate, abet, advise, or teach by any means any person to commit, attempt to commit, or assist in the commission of any such act under such circumstances as to constitute a clear and present danger to the security of the United States, or of the

state of New Hampshire or of any political subdivision of either of them; or

(c) conspire with one or more persons to commit any such act; or

(d) assist in the formation or participate in the management or to contribute to the support of any subversive organization or foreign subversive organization knowing said organization to be a subversive organization or a foreign subversive organization; or

(e) destroy any books, records or files, or secrete any funds in this state of a subversive organization or a foreign subversive organization, knowing said organization to be such.

Any person who shall be convicted by a court of competent jurisdiction of violating any of the provisions of this section shall be fined not more than twenty thousand dollars, or imprisoned for not more than twenty years, or both, at the discretion of the court.

3. Penalty. It shall be a felony for any person after August 1, 1951 to become, or after November 1, 1951 to remain a member of a subversive organization or a foreign subversive organization knowing said organization to be a subversive organization or foreign subversive organization. Any person who shall be convicted by a court of competent jurisdiction of violating this section shall be fined not more than five thousand dollars, or imprisoned for not more than five years, or both, at the discretion of the court.

4. Barred from Office. Any person who shall be convicted by a court of competent jurisdiction of violating any of the provisions of sections 2 and 3 of this chapter, in addition to all other penalties therein provided, shall from the date of such conviction be barred from

(a) holding any office, elective or appointive, or any other position of profit or trust in or employment by the government

of the state of New Hampshire or any agency thereof or of any county, municipal corporation or other political subdivision of said state;

(b) filing or standing for election to any public office in the state of New Hampshire.

5. Dissolution of Organizations. It shall be unlawful for any subversive organization or foreign subversive organization to exist or function in the state of New Hampshire and any organization which by a court of competent jurisdiction is found to have violated the provisions of this section shall be dissolved, and if it be a corporation organized and existing under the laws of the state of New Hampshire, a finding by a court of competent jurisdiction that it has violated the provisions of this section shall constitute legal cause for forfeiture of its charter and its charter shall be forfeited, and all funds, books, records and files of every kind and all other property of any organization found to have violated the provisions of this section shall be seized by and for the state of New Hampshire, the funds to be deposited in the state treasury and the books, records, files and other property to be turned over to the attorney general of New Hampshire.

6. Assistance Furnished. For the collection of any evidence and information referred to in this chapter, the attorney general is hereby directed to call upon the superintendent of state police, and county and municipal police authorities of the state to furnish him such assistance as may from time to time be required. Such police authorities are directed to furnish information and assistance as may be from time to time so requested. The attorney general may testify before any grand jury as to matters referred to in this chapter as to which he may have information.

7. Records. The attorney general shall maintain complete records of all information received by him and all matters handled by him under the requirements of this chapter. Such records as may reflect on the loyalty of any resident of this state shall not

be made public nor divulged to any person except with the permissions of the attorney general to effectuate the purposes hereof.

8. Grand Jury Inquiries. The superior court, when in its discretion it appears appropriate, or when informed by the county solicitor that there is information or evidence of the character described in section 2 of this chapter to be considered by the grand jury, shall charge the grand jury to inquire into violations of this chapter for the purpose of proper action, and further to inquire generally into the purposes, processes and activities and any other matters affecting communism or any related or other subversive organizations, associations, groups or persons.

LOYALTY

9. Employment. No subversive person, as defined in this chapter, shall be eligible for employment in, or appointment to any office, or any position of trust or profit in the government of, or in the administration of the business of this state, or of any county, municipality, or other political subdivision of this state.

10. Written Statements Required. Every person and every board, commission, council, department, court or other agency of the state of New Hampshire or any political subdivision thereof, who or which appoints or employs or supervises in any manner the appointment or employment of public officials or employees shall establish by rules, regulations or otherwise, procedures designed to ascertain before any person, including teachers and other employees of any public educational institution in this state, is appointed or employed, that he or she as the case may be, is not a subversive person, and that there are no reasonable grounds to believe such persons are subversive persons. In the event such reasonable grounds exist, he or she as the case may be, shall not be appointed or employed. In securing any facts necessary to ascertain the information herein required, the applicant shall be required to sign a written statement containing answers to such inquiries as may be material, which statement shall contain notice that it is subject to the penalties of perjury.

11. Exceptions. The inquiries prescribed in section 10 other than the written statement to be executed by an applicant for employment, shall not be required as a prerequisite to the employment of any persons in the classification of laborers in any case in which the employing authority shall in his or its discretion determine, and by rule and regulation specify the reasons why, the nature of the work to be performed is such that employment of persons as to whom there may be reasonable grounds to believe that they are subversive persons as defined in this chapter will not be dangerous to the health of the citizens or the security of the government of the United States, the state of New Hampshire or any political subdivision thereof.

12. Present Employees. Every person, who on August 1, 1951 shall be in the employ of the state of New Hampshire or of any political subdivision thereof, other than those now holding elective office shall be required on or before October 1, 1951 to make a written statement which shall contain notice that it is subject to the penalties of perjury, that he or she is not a subversive person as defined in this chapter, namely, any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of New Hampshire, or any political subdivision of either of them, by force, or violence; or who is a member of a subversive organization or a foreign subversive organization, as more fully defined in this chapter such statement shall be prepared and execution required by every person and every board, commission, council, department, court, or other agency of the state of New Hampshire or any political subdivision thereof responsible for the supervision of employees under its jurisdiction. Any such person failing or refusing to execute such a statement or who admits he is a subversive person as defined in this chapter shall immediately be discharged.

13. Discharge of Personnel; Hearing. Reasonable grounds on all the evidence to believe that any person is a subversive person, as defined in this chapter shall be cause for discharge from any appointive office or other position of profit or trust in the government of or in the administration of the business of this state, or of any county, municipality or other political subdivision of this state, or any agency thereof. The personnel commission shall, by appropriate rules or regulations, prescribe that persons charged with being subversive persons, as defined in this chapter, shall be accorded notice and opportunity to be heard, in accordance with the procedures prescribed by law for discharges for other reasons. Every person and every board, commission, council, department, or other agency of the state of New Hampshire or any political subdivision thereof having responsibility for the appointment, employment or supervision of public employees not covered by the state classified service shall establish rules or procedures similar to those required herein for classified services for a hearing for any person charged with being a subversive person, as defined in this chapter after notice and opportunity to be heard. Every employing authority discharging any person pursuant to any provision of this chapter shall promptly report to the attorney general the fact of and the circumstances surrounding such discharge. A person discharged under the provisions of this section shall have the right within thirty days thereafter to appeal to the superior court of the county where such person may reside for a determination by such court (with the aid of a jury if the appellant so elects) as to whether or not the discharge appealed from was justified under the provisions of this act. The court shall speedily hear and determine such appeals, and from the judgment of the court, there shall be a further appeal to the supreme court of New Hampshire as in civil cases.

14. Declarations of Candidates. No person shall become a candidate for election to, nor qualify for, any public office under the election laws of this state unless he or she shall file with the declaration of candidacy, or prior to qualifying, an affidavit that

he or she is not a subversive person as defined in this chapter. No declaration of candidacy shall be received for filing by any town or city clerk or by the secretary of state unless accompanied by the affidavit aforesaid and there shall not be entered upon any ballot or voting machine at any election the name of the person who has failed or refused to make the affidavit aforesaid. 1953, c. 180, s. 1.

15. False Statements. Every written statement made pursuant to this chapter by an applicant for appointment or employment, or by any employee shall be deemed to have been made under oath if it contains a declaration preceding the signature of the maker to the effect that it is made under the penalties of perjury. Any person who makes a material misstatement of fact (a) in any such written statement, or (b) in any affidavit made pursuant to the provisions of this chapter, or (c) under oath in any hearing conducted by any agency of the state, or of any of its political subdivisions, pursuant to this chapter, or (d) in any written statement by an applicant for appointment or employment or by an employee in any state aid institution of learning in this state, intended to determine whether or not such applicant or employee is a subversive person as defined in this chapter, which statement contains notice that it is subject to the penalties of perjury shall be subject to the penalties of perjury prescribed in chapter 457 of the Revised Laws.

16. Separability. If any provision, phrase, or clause of this chapter or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions, phrases, or clauses or applications of this chapter which can be given effect without the invalid provision, phrase, or clause or application and to this end the provisions, phrases and clauses of this chapter are declared to be severable.

17. Title. This chapter may be cited as the Subversive Activities Act of 1951.

[Approved August 1, 1951.]

APPENDIX C

Laws of 1953, chapter 307

Joint Resolution Relating to the Investigation of Subversive Activities.

Resolved by the Senate and House of Representatives in General Court convened:

That the attorney general is hereby authorized and directed to make full and complete investigation with respect to violations of the subversive activities act of 1951 and to determine whether subversive persons as defined in said act are presently located within this state. The attorney general is authorized to act upon his own motion and upon such information as in his judgment may be reasonable or reliable. He may authorize any member of his staff to conduct on his behalf any part of the investigation herein provided for and in such event and for such purposes any member so authorized shall have all of the powers herein granted to the attorney general.

For the purposes of this resolution, the attorney general or any duly authorized member of his staff is authorized to sit and act at such times and places during this session of the 1953 legislature, recess and adjourned periods, and to employ such attorneys, experts, clerical and other assistance as may be required, to require by subpoena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents, and to administer such oaths, to take such testimony and to make such expenditures within the limitations authorized herein as he deems advisable. The provisions of section 7 of chapter 193 of the Laws of 1951 shall be inapplicable to the investigation provided for herein, and the attorney general is hereby authorized to make public such information received by him, testimony given before him, and matters handled by him as he deems fit to effectuate the purposes of this resolution.

The attorney general is directed to proceed with criminal prosecutions under the subversive activities act whenever evidence presented to him in the course of the investigation indicates

violations thereof, and he shall report to the 1955 session on the first day of its regular session the results of this investigation, together with his recommendations, if any, for necessary legislation. There is hereby appropriated for the expenses of this investigation the sum of ten thousand dollars which shall include the cost of printing such report as is provided for by this resolution and shall be expended under the direction of the attorney general, but nothing herein contained shall limit the power of the attorney general to act in cases of reasonable necessity under the provisions of section 11 of chapter 24 of the Revised Laws. The governor is hereby authorized to draw his warrants for the sum hereby appropriated out of any money in the treasury not otherwise appropriated.

[Approved June 17, 1953.]

APPENDIX D

Laws of 1955, Chapter 197

AN ACT RELATIVE TO INVESTIGATION OF SUBVERSIVE ACTIVITIES.

Be it enacted by the Senate and House of Representatives in General Court convened:

1. Subversive Investigation. The investigation of subversive activities by the attorney general provided for by chapter 307 of the Laws of 1953, as continued by a resolution approved January 13, 1955, is hereby continued in full force and effect, in form, manner and authority as therein provided for the further period until June 30, 1957. The attorney general shall report to the general court of 1957 the results of this futher investigation together with his recommendations, if any, for necessary legislation. He may at any time during said period temporarily or permanently conclude his investigation hereunder if, in his opinion, no useful public purpose would be served by continuation of the investigation. There is hereby appropriated for the expenses of this continued investigation a sum not to exceed forty-two thousand five hundred dollars, which shall include the cost of printing such report as is provided for hereby, but nothing

herein contained shall limit the power of the attorney general to act in cases of reasonable necessity under the provisions of section 11 of chapter 24 of the Revised Laws (section 12, chapter 7, RSA). The governor is hereby authorized to draw his warrants for the sum hereby appropriated out of any money in the treasury not otherwise appropriated.

2. Takes Effect. This act shall take effect upon its passage.

[Approved June 14, 1955.]

APPENDIX E

Note: The following rules of procedure were adopted by the Attorney General and are applicable to the testimony given by Sweezy at both hearings.

RULES OF PROCEDURE

Investigation of Subversive Activities

Laws of 1953, chapter 307
New Hampshire

JULY 1, 1953*

Explanatory Note

Laws of 1953, chapter 307, providing for the investigation of subversive persons and activities within New Hampshire, authorizes the conduct of hearings at which testimony under oath may be required from anyone in New Hampshire. Conceivably this testimony may raise constitutional questions and other legal problems affecting the rights of witnesses, and to eliminate confusion as to the extent and nature of these rights, to clarify the manner of conduct of hearings under chapter 307, the following RULES OF PROCEDURE are published in advance of hearings. It should be recognized that these RULES OF PROCEDURE are subject to modification at any time.

* as amended May 5, 1954.

RULES

1. *Executive Session.*

Witnesses in all cases will be first advised of the contents of Laws of 1953, chapter 307, and of their constitutional privilege against self-incrimination. Insofar as is possible, examination of witnesses will be conducted in executive session. Hearings will not be held in public unless requested by the witness. Transcripts of testimony taken in executive session will be made public only when in the opinion of the Attorney General, in each individual case, such publicity is required to effectuate the purposes of Laws 1953, chapter 307.

2. *Right to Counsel.*

At either executive or public hearings, every witness may have counsel of his own choosing, if desired. Whenever questioned under oath by the Attorney General or any duly authorized member of his staff, a witness shall, prior thereto, be informed of this privilege of counsel. Attorneys not members of the bar of the State of New Hampshire will not be recognized as counsel unless they are associated with a member of the bar of this state in good standing and this associate member of the bar of the State of New Hampshire in good standing shall be present at all times during any hearing, either executive or public, at which a witness requests to be represented by counsel.

3. *Participation of Counsel.*

On behalf of a witness to whom he is counsel, an attorney shall have the right to participate in hearings as follows:

(a) to advise the witness of his legal rights;

(b) to make legal objection to questions and procedures and to submit brief statements in support of such objections, which may be either oral or in the form of memoranda, in which latter event such memoranda may be later filed for record;

(c) although witnesses are not parties and are not entitled of legal right to cross-examine other witnesses, counsel may submit to the Attorney General or to such other authorized member of his staff conducting the hearing, written questions directed to witnesses testifying as to relevant facts substantially derogatory to the reputation and character of his client;

NOTE: This confers no right upon counsel to be present at an executive session (private hearing) when his own client is not testifying, but is confined to public hearings at which testimony is given by others derogatory to his own client; it further confers no absolute right that the questions so written shall be presented if determined by the Attorney General to be irrelevant, scurrilous, insulting or impertinent.

(d) to submit as part of the record a written statement of his client, explaining or refuting testimony relating to his client, provided such statement is relevant and not defamatory, but such written statement need not be incorporated in the transcript of hearings. All questions as to qualification of documents, relevancy of material contained therein, and claim of legal right including the relevancy of submitted written questions shall be finally determined by the Attorney General.

4. *Transcript of Testimony.*

An accurate stenographic record shall be kept of the testimony of all witnesses in both executive and public hearings. Final determination as to publication of all or part of the testimony given in executive session shall be made pursuant to the authority of chapter 307 by the Attorney General.

Copies of transcripts of public hearings or of transcripts publicly released in lieu thereof shall be available for purchase from the stenographer reporting to same by any person. Witnesses (and counsel) shall have the right to inspect the complete

transcript of their own testimony given in executive session but are required to keep such testimony confidential until and unless it is later made public by the Attorney General.

5. *Rules of Evidence.*

Being a fact-finding investigation in aid of the legislative process, judicial rules of evidence will not apply. As far as possible, all evidence shall be relevant and limited to testimony of facts within the knowledge of the witness. Relevancy, pertinency of questions, and admissibility of evidence, shall be determined by the Attorney General.

6. *Reports Derogatory to Individuals.*

Publication of reports, statements, testimony or findings based thereon, shall not be issued unless found by the Attorney General to be substantially within the purpose of chapter 307 and based upon evidence presented at hearings and under oath.

7. *Television and Radio.*

In the event of request to televise or broadcast a public hearing, witnesses summoned to appear and testify thereat shall be notified of such request in writing by the Attorney General not less than twenty-four hours prior to the date set for hearing. Witnesses requesting that their testimony not be televised or broadcast shall have their request granted, provided the request is made not less than twelve hours prior to the date and hour of the hearing.

8. *Service of Subpoena.*

So far as possible, all witnesses summoned to testify either in executive session or at public hearings shall be furnished a copy of these RULES OF PROCEDURE at the time service of subpoena is made.

9. *Public Hearing.*

To protect citizens of the state from irresponsible charges, witnesses are directed to mention the name of no persons in a public hearing until all information concerning those persons in the possession of the witness has been furnished in executive session.

LOUIS C. WYMAN
Attorney General